UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

EASTERN ESSENTIAL SERVICES,

Respondent,

and **Case 22-CA-133001**

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 32BJ,

Charging Party.

EASTERN ESSENTIAL SERVICE'S POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATEMENT OF THE CASE

The Complaint alleges that Eastern Essential Services ("EES," "Company," or "Respondent") engaged in discriminatory hiring practices at the three (3) locations involved in this case, and, therefore, had a duty to recognize or bargain with the Service Employees International Union, Local 32BJ ("Union" or "Charging Party"). General Counsel failed to establish a *prima facie* case. Even assuming it did so, the Company met it burden under Wright Line. As such, the Complaint should be dismissed in its entirety.

General Counsel's allegations of animus at 120 Mountainview Boulevard, Warren, New Jersey ("120 Mountainview") and One Meadowlands Plaza in East Rutherford, New Jersey ("One Meadowlands") are based solely on statements, none of which, even if true, rise to the level of substantial union animus. In fact, at 120 Mountainview, the alleged statement was double hearsay from a non-EES employee. With respect to One Meadowlands, one of the statements was merely a factual statement, i.e., EES is a non-union Company, unaccompanied by any threat. The other alleged statement lacks any credibility, and, even if true, was nothing more than an offhanded comment to one individual – and obviously not substantial. As to 300 Lighting Way in Secaucus, NJ ("300 Lighting Way"), the overwhelming evidence shows that offers were made and not accepted by the former employees. Three (3) of General Counsel's witnesses corroborated the EES witnesses' testimony that the offers were not accepted. Other General Counsel's witness testimony was inconsistent on material facts and contradicted documentary evidence. In sum, and as set forth in full below, the weight of the record evidence establishes that there is no evidence of animus at any location, and certainly not the type cited in cases in which the NLRB finds *prima facie* evidence of discriminatory hiring.

But even assuming, *arguendo*, that the ALJ finds *prima facie* evidence of discriminatory hiring, the Complaint still must be dismissed. Indeed, this case is on all fours with GFS Building

Maintenance, Inc., 330 NLRB 747, 752 (2000), where the Board upheld the ALJ's ruling that, despite *prima facie* animus evidence, the cleaning contractor met its burden and did not violate the Act when it refused to hire the incumbent employees according to its long-standing hiring policy. Company President and Owner Tom Quinn ("Quinn") has employed the same hiring practices since he purchased EES twelve (12) years ago. That is, except for the rare occasions when a customer instructs it to, the Company does not hire any incumbent employees when it takes over a contract. Rather, it hires based on internal referrals. Moreover, except for the three locations at issue in this case, in its entire history, EES has taken over only one other job at a location with unionized incumbents. In sum, EES acted entirely consistent with its long-held hiring practice, and, as such, pursuant to GFS, the Complaint should be dismissed.

General Counsel and Charging Party will try to distinguish this case from GFS because the employer in GFS normally operated in a "union-free" New Hampshire. First, that is not the holding of GFS. To the contrary, GFS simply held that an Employer meets its burden when it does not deviate from its normal hiring practice even in the face of substantial union animus. But even if General Counsel and Charging Party are correct, the record evidence establishes that EES took over only one (1) other account in its history with unionized incumbent employees. In other words, in its twelve (12) years of being in business, it has operated in its own "union-free" environment. Indeed, as Charging Party's Counsel stated at hearing, "How could you have – how could there possibly be a discriminatory motivation for a policy that is developed and applied in a non-Union environment[?]" (Tr. 347).

Finally, General Counsel never alleged – in its Amended Complaint or at trial – that EES's hiring practices are inherently destructive. As such, General Counsel is barred from making such an argument. In any event, the hiring practice is not inherently destructive. Indeed,

EES's practice is a legitimate, non-discriminatory reason for not hiring the predecessor's employees, which does not facially preclude the possibility of hiring employees with union preferences or backgrounds.

In light of the foregoing, and as set forth in detail below, EES engaged in no discriminatory hiring, and, therefore, had no duty to recognize or bargain with the Union.

PROCEDURAL HISTORY

By charge dated July 8, 2014[1], the Union alleged, *inter alia*, that Respondent violated Sections 8(a)(1), (3) and (5) of the National Labor Relations Act ("NLRA" or the "Act") by discriminatorily refusing to hire employees of predecessor contractors at three locations in New Jersey, refusing to recognize and bargain with the Union, and unlawfully changing terms and conditions of employment. (GCX #1(a)).[2] On November 28 the Regional Director for Region 22 ("Regional Director") of the National Labor Relations Board ("NLRB" or the "Board") issued a Complaint and Notice of Hearing alleging that EES: (i) "impliedly threatened" the predecessor contractors' employees, (ii) refused to hire the predecessor contractors' employees, (iii) unilaterally changed terms and conditions of employment at three employment sites, and (iv) refused to recognize and bargain the Union as the collective bargaining representative of employees at three employment sites. (GCX #1(b)). On December 11, EES timely filed an Answer denying the substantive allegations and asserted a number of affirmative and other defenses. (GCX #1(c)). On December 22, Respondent filed a Motion for Summary Judgment (GCX #1), and on December 23 the Regional Director issued and Order re-scheduling the hearing from January 21, 2015 to February 3, 2015. (GCX #1). The General Counsel filed its Opposition to Respondent's Motion for Summary Judgment on December 30 (GCX #1), and

[1] Hereinafter, all dates refer to 2014 unless otherwise noted.
[2] Citations to the transcript page and exhibit numbers are as follows: Transcript = Tr.; Joint Exhibit = JTX; General Counsel Exhibit = GCX; Respondent Exhibit = RX; and, Charging Party Exhibit = CPX.

Respondent filed its Reply on January 5, 2015. On January 28, 2015, Respondent filed an amended Answer. (GCX #1).

Administrative Law Judge Steven Davis ("Judge Davis") presided over a four (4) day hearing between February 3 and February 6, 2015.[3] In order of their appearance, the following witnesses testified on behalf of either the Acting General Counsel or the Union: Kevin Brown, Luz Garate, Rodrigo Puerta-Gil, Teresa Hernandez, Jeffrey Edelstein, Beatriz Bautista, Maria De La Torre, Yvon Feo Hernandez, Maritza Alvarado, Christopher Pipa, Gladys Sanchez, Jessica Collado, Luz Orozco, and Eleodro Luciano. In order of their appearance, the following witnesses testified on behalf of EES: Thomas Quinn, Arnold Perilla, and William Castro.

STATEMENT OF THE FACTS

I. BACKGROUND

A. Eastern Essential Services

EES, a non-union company, based in Fairfield, New Jersey, performs commercial cleaning services in northern New Jersey primarily in Somerset, Morris, Passaic, and Bergen counties. (Tr. 393). In 2003, Quinn purchased EES. (Tr. 393). Currently, EES performs cleaning services for approximately eighty-eight (88) buildings. (Tr. 393-94). Eighty-five percent (85%) of EES's accounts are corporate owned. (Tr. 393-94). The Company averages eight (8) to ten (10) new accounts a year. (Tr. 452). Seventy (70) of the eighty-eight (88) buildings are under 100,000 square feet while the remaining seventeen (17), including 120

[3] General Counsel amended the Complaint to allege that Arnold Perilla "impliedly threatened its employees at Respondent's One Meadowlands Plaza location," rather than at 120 Mountainview, as alleged in the original complaint. General Counsel also amended the Complaint to allege that William Castro, rather Arnold Perilla "impliedly threatened Collins Building Service employees" on June 27, 2014. (GCX #1(j)).

Mountainview, One Meadowlands and 300 Lighting Way, are in excess of 100,000 square feet. (Tr. 394).[4]

None of EES's employees are represented by a Union. (Tr. 468). During the twelve (12) years Quinn has owned the Company, EES has only taken over four (4) buildings where the predecessors' employees were represented by a Union.

> Q. Okay. What percentage of the buildings that you take over are or that – where the cleaners are not represented by a Union?
>
> A. All but four.
>
> Q. Okay.
>
> A. In my history.
>
> Q. And would that four (4) include the three (3) here?
>
> A. Yes.

(Tr. 416).

In other words, except for the three (3) buildings at issue, at only one (1) other building was the predecessor's employees represented by a Union. (Tr. 416). The other building was BAE Systems ("BAE") in Totowa, New Jersey, where EES took over the cleaning services in 2007. (Tr. 415-16). Union Vice President and State Director Kevin Brown ("Brown") corroborated Quinn's testimony on this point. (Tr. 77-78). Indeed, Brown testified that the Union cleaning contractor at BAE was replaced by a non-union Contractor. (Tr. 77-78).

[4] The "Master Contract" between the Union and certain New Jersey Cleaning Contractors excludes Commercial buildings under 100,000 square feet. (GCX #2.)

B. Eastern Essential Services's Longstanding Hiring Practice

1. EES Never Hired The Predecessor Employees Except In The Rare Instance When Requested To Do So By The Client

EES never hires the predecessor's employees when taking over an account, unless instructed to do so by the client. (Tr. 395, 461, 481, 542). This practice has been in place since 2003. (Tr. 395). On the rare occasion that EES is instructed to hire the predecessor's employees, it is typically only one (1) employee – the day porter. (Tr. 395).

The Company's operations managers, who are responsible for staffing, corroborated Quinn's unrebutted testimony.[5] Arnold Perilla ("Perilla"), who has worked for EES since before Quinn acquired the Company and has staffed at least forty (40) different accounts since, has never hired the predecessor's employees. (Tr. 480-81). During Operation Manager William Castro's ("Castro") five (5) years with the Company, he also has not hired predecessor contractors' employees, except at the request of the client. (Tr. 542).

a) The Internal Referral System

Normally, EES receives three (3) to four (4) weeks' notice prior to taking over a building. (Tr. 396-397, 481). EES does not solicit from help-wanted ads to find employees. (Tr. 451). Instead, the Company utilizes internal references when staffing a new account as well when replacing existing employees.[6] (Tr. 395, 451). As Quinn explained during cross examination:

> ...the operations managers have a network of people [they] deal with on a constant basis, cleaners and so forth that have family, friends that constantly refer people for part-time work and jobs. And at any given time my guys have lists of people that are looking for positions.

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[5] Brown and Edelstein corroborated the Company's practice of not hiring the predecessor's employees. (Tr. 77-78, 232, 238, 240). Indeed, Brown confirmed that was the case at BAE in 2007. (Tr. 77-78). Edelstein also did not dispute the Company's practice but instead testified that he believed such a practice is not likely a sustainable business model. (Tr. 233). According to Edelstein, a Company that utilizes such a practice likely would not survive after ten (10) years. (Tr. 247). Edelstein admitted that he was totally unfamiliar with EES's business including the three (3) buildings at issue. (Tr. 247-48). Finally, Edelstein acknowledged that EES could be successful and profitable by utilizing its hiring practice of never hiring the predecessor's employees. (Tr. 246-47).

[6] Additionally, the Company shifts workers from one location to another for short-term needs. (Tr. 575).

(Tr. 452). In this regard, Perilla testified that he finds employees "[t]hrough my other employees. They are referred to me." (Tr. 481). Castro testified that he uses the same system. (Tr. 542-43, 572-73).

C. The Properties At Issue

1. 120 Mountainview – May 15

On or about April 15, Fred Arena ("Arena"), owner of Vision Properties, telephoned Quinn to have EES provide cleaning services for a 140,000 square foot building he was purchasing on May 12 located at 120 Mountainview[7]. (Tr. 396, 90). At that time, Quinn told Castro to begin hiring cleaners to staff the building. (Tr 396). Castro utilized his internal referral system and found eight (8) cleaners quickly and with no problems. (Tr. 542-43). In fact, Castro testified that 120 Mountainview was "easy" to staff. (Tr. 573).

> Q. And were you able to find employees?
>
> A. Yes.
>
> Q. Do you remember where you found those employees?
>
> A. I received help from internal personnel that already works at the company at other buildings that are nearby.

(Tr. 542-43). In particular, "Mario," an EES employee, referred Castro the employees hired for 120 Mountainview. (Tr. 543).

Brown testified that he mailed Quinn a letter dated May 12 advising that seven (7) CRS Facility Services ("CRS") cleaners who worked at 120 Mountainview were represented by the Union and were willing to work for EES. (Tr. 38-39). Brown requested information on the application process. (GCX #8). Attached to the letter were the CRS employees' names, hire

[7] Quinn testified that EES performs the cleaning services for five (5) or six (6) buildings in New Jersey that are owned by Arena. (Tr. 339-340). In each of those situations, EES did not hire the predecessors' employees. (Tr. 339-40).

dates, and $12.80 hourly wage being paid by CRS. (GCX #8). The Union also attempted to fax Brown's letter on May 12 and May 14; however, on both occasions the transmissions failed. (GCX #10). The May 12 letter was also emailed to tomq@easternsvc.com on May 12. (GCX #7). Quinn testified that tomq@easternsvc.com is not the email address he normally utilizes but admitted that it is a working address owned by EES. (Tr. 399-400). Quinn further testified that he never saw the May 12 letter prior to the hearing but acknowledged that his office received a UPS Delivery from the Union on May 13. (Tr. 398, GCX#9). Although he had not previously seen the letter or the email, he candidly stated that he had no reason to doubt the letter or email was received.[8] (Tr. 400). In any event, Quinn did not respond to either the letter or email. (Tr. 437).

On the evening of May 15, 2014, Castro arrived at 120 Mountaview. (Tr. 555-56). Union Field Representative Gladys Sanchez ("Sanchez") and former CRS employees were at the building in the parking lot. (Tr. 378). Castro did not speak to Sanchez or any of the former CRS employees. (Tr. 556-57). Sanchez and Yvonne Feo Hernandez ("Feo Hernandez") confirmed that no conversation took place with Castro and the Petition was never given to him. (Tr. 378-79, 316-17). Both acknowledged that they spoke only to a security guard, and Feo Hernandez testified it was the same security guard that had been working at 120 Mountainview prior to May 15. (Tr. 320). (Sanchez did not know by whom the security guard was employed.) (Tr. 380). Both had different accounts as to what was said by the security guard. (Tr. 377-78, 314-16). Feo Hernandez testified that the CRS employees were in the parking lot when they were greeted by a male security guard holding a baton who told Sanchez that the building *owner* did not want

[8] Sanchez testified that she believed the Petition signed by former CRS 120 Mountainview employees was emailed and faxed to EES by Polanco. (Tr. 375). However, Sanchez admitted that she had no personal knowledge that either was done. (Tr. 381). Indeed, the Union was unable to produce the email or fax confirmation sheet. (Tr. 381-82).

anyone with the Union. (Tr. 314-16). Sanchez testified that the female security guard told them the building *manager* did not want a union and that they must leave, which they did after the security guard took out her phone to call the police. (Tr. 378).[9]

Feo Hernandez testified that she and one (1) other former CRS employee, Reyna Hernandez ("R. Hernandez"), after waiting (3) three weeks, went to EES's office to submit applications. (Tr. 317). The Company received only two (2) applications from the former CRS employees: Hector Mora ("Mora") (dated July 16) and R. Hernandez (dated July 25). (RX #2, Tr. 417).

2. One Meadowlands – June 27

On or about May 19, Arena telephoned Quinn regarding a 400,000 square foot building at One Meadowlands he was purchasing on June 27 for which he wanted EES to provide the cleaning services. (Tr. 400, 406). Quinn met with Vice President of Janitorial Operations Dave Pittinger ("Pittinger"), Castro and Perilla at that time and told them to begin using their internal referrals to hire cleaners for One Meadowlands. (Tr. 401-02). Perilla took the lead and hired fifteen (15) to twenty (20) employees through his internal referrals. (Tr. 481-82). Each of them filled out applications, which Perilla gave to Castro. (Tr. 482).[10]

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[9] Hernandez testified that Sanchez had a "meeting" on May 12 at 120 Mountainview with the CRS employees. (Tr. 312-13). According to Feo Hernandez, either Jose Munoz ("Munoz"), a CRS employee, or Sanchez stated that the new owner of the building did not want them because of the Union. (Tr. 312-13). Sanchez contradicted Feo Hernandez. (See Tr. 371-74). Sanchez never testified that anything was said about the new owner and the Union. (Tr. 371-74). According to Sanchez, the only thing discussed was what the Union wanted to do with the Petition. (Tr. 371-74).

[10] Castro filled in certain information including the date on the applications given to him by Perilla for several of the nineteen (19) One Meadowlands employees who began working on June 27. (Tr. 544, 548-49). Castro testified that he inserted June 27 because that was the start date, even though the applications were filled out earlier. (Tr. 544, 548-49). Castro also testified that he made a few mistakes. For example, Castro stamped the incorrect date of August 8 on Sosa Cabrera's application which was later corrected to July 7, his start date as confirmed by the payroll records. (GCX #29; Tr. 548).

For instance, Perilla met Rodrigo Puerta-Gil ("Puerta-Gil")[11] in June at a bakery in Paterson, New Jersey. (Tr. 491, 495). Puerta-Gil had been referred to Perilla by a twelve (12)-year EES employee. (Tr. 491, 495). Perilla asked Puerta-Gil if he had any cleaning experience, which he did. (Tr. 497). Puerta-Gil filled out an application and was offered the job at $8.50 per hour. (Tr. 491). Puerta-Gil confirmed Perilla's testimony as to what transpired except for Perilla's response to Puerta-Gil's question about the $8.50 wage rate. (Tr. 144-45). According to Puerta-Gil, Perilla said; "That was what the Company paid – the Company didn't have a Union and they were not able to pay more." (Tr. 145, 146). Perilla denied making any statements regarding a Union. (Tr. 491).

On the morning of June 27, Quinn, his brother, Dennis, and Pittinger went to One Meadowlands at 7:30 a.m. to unload equipment. (Tr. 404). Castro arrived a short time later to assist them. (Tr. 404). Castro was extremely busy until he left late that morning and never spoke to the former Day Porter, Beatriz Bautista ("Bautista"). (Tr. 545). Indeed, Quinn never saw her there. (Tr. 429). According to Bautista, she briefly spoke to a "Hispanic guy". (Tr. 258-61). Bautista testified that the building engineer "Danny" introduced her to two (2) men who she believed to be with "the new Company." (Tr. 258-261). Bautista further testified that she was told to speak to the "Hispanic Guy", who upon being introduced, told her "the reason we don't accept you is because you are with the Union," to which Bautista responded, "okay thank you." (Tr. 261, 269).[12] Bautista never asked him for his name nor did she mention this alleged statement to anyone in the Union despite being told the day before by Maritza Alvarado

[11] Puerta-Gil a former long-time Local 32B member lives in the same neighborhood as his friend "Martha who works for the Union". (Tr. 145, 156). According to Puerta-Gil, he was unjustly terminated by Reuben Galvez after working for approximately two months at 300 Lighting Way and threatened to sue EES if it refused to re-employ him. (Tr. 157-58).

[12] Bautista also testified that the "Hispanic Guy" said "I'm sorry, I'm sorry very much". (Tr. 269). Bautista admitted there was nothing to that effect in her affidavit. (Tr. 277).

("Alvarado"), another CBS Cleaner at One Meadowlands, that the Union was going to attempt to keep them employed with EES. (Tr. 255-56, 271, 274).[13]

On the evening of June 27, former CBS Cleaners came to One Meadowlands with Luz Garate ("Garate"), Union Assistant New Jersey District Leader. (Tr. 95, 104). According to Alvarado and Garate, two (2) men, including building engineer Danny and another man from the new Company, met them outside. (Tr. 327-328). Garate testified that the man from the new Company told her there were no jobs for the former employees and asked them to leave. (Tr. 107). Garate confirmed that he never mentioned anything about the Union. (Tr. 107).[14]

Castro did not return to One Meadowlands on the evening of June 27. (Tr. 545, 404-05). He was busy working at another building. (Tr. 404-05, 545).[15] Only Quinn and Pittinger were there with the nineteen (19) cleaners including Puerta-Gil and the two (2) individuals referred by him, Quenida Henriquez ("Heriquez")[16] and Beatriz Rodriguez ("Rodrigeuz"). (Tr. 404-05, 146). Puerta-Gil testified that although the cleaners may have worked five and one-half (5½) hours on June 27, none of the cleaners had any difficulty completing their work assignments. (Tr. 148, 174). Puerta-Gil admitted that every night thereafter cleaners only worked four (4) hours a night. (Tr. 174.) On July 1, Puerta-Gil was laid off by Castro because One

[13] Sometime during the day on June 27, Quinn received a letter from the Union informing EES it would be sending a list of the CBS employees working at One Meadowlands and asking for applications. (RX #1). Quinn never responded to the letter. (Tr. 437). The letter dated June 26 regarding One Meadowlands that Brown claimed he sent was not the same letter received by Quinn. (GCX #11, RX#1).

[14] Alvarado contradicted Garate's testimony. (Tr. 329). Although acknowledging that she was fifteen (15) feet away and could not hear any of the conversation between the EES employee and Garate, Alvarado claimed she overheard that the CBS employees were not allowed in because of the Union. (Tr. 329).

[15] Despite Castro not being at One Meadowlands, Puerta-Gil inexplicably testified that he spoke to Castro that evening. (Tr.148).

[16] Puerta Gil testified that Henriquez did not fill out an application. (Tr. 147). In fact, the Company received an application for Henriquez, and it is dated June 27. (GCX #28)

Meadowlands was overstaffed. (Tr. 150).[17]

Sometime during the week following June 27, Alvarado and six (6) other former CBS employees went to EES's offices to fill out applications, and, according to Alvardo, EES refused to give them applications. (Tr. 332). Alvarado further testified that one of the former CRS employees brought her daughter, Jessica Collado ("Collado"). (Tr. 330, 384). Collado entered EES's offices thinking she would be given an application, as opposed to the former CRS employees, who had been wearing union shirts. (Tr. 384, 387-89). Collado was not given an application. (Tr. 388-89). Alvarado returned to EES a week or two (2) later with three (3) or four (4) former CBS employees, all of whom were given applications. (Tr. 334). Alvarado filled out the application and handed it to a woman at the office. (Tr. 334). Collado also went back to EES for an application and, unlike Alvarado and the others, she was not given an application. (Tr. 391). According to Collado, the woman she spoke to was very nasty. (Tr. 391). Garate also testified that she went to EES's offices but did not know when or how many former CRS employees she brought. (Tr. 150-173). Nor was she able to recall whether they were given applications. (Tr. 110-11). In any event, EES received fourteen (14) applications from former CRS employees: three (3) dated July 7 (Ebelia Martinez, Maria Valencia, and Maida Veras), seven (7) dated July 22 (Luis Airos, Beatriz Bautista, Carlos Zuniba, Luisa Flores, Rafaela Herrera, Indira Persaud, and Margarita Reberon) and four (4) dated July 23 (Maritza Alvarado, Marina Castellanos, Julio Mercedes, and Hilda Tobar). (RX #4).

[17] Puerta Gil continued to work days for EES until July 8 when he began working at 300 Lighting Way for approximately two months. (Tr. 147). According to Puerta-Gil when he returned to One Meadowlands in approximately late September, only one (1) cleaner from June 27 was still there. (Tr. 157-58). The documentary evidence completely contradicts his testimony. (GCX #28). Indeed, 10 EES employees were still working at One Meadowlands in late September when Puerta-Gil returned there: Marco Chaves, Liliana Corales, Victor Garcia-Bambaren, Consuelo Macias, Jose Moz, Fausto Rodriguez Polanco, Beatriz Rodriguez, Gloria Segura, Yacayra Serrano, and Audrey Solorzano. (GCX #28).

3. 300 Lighting Way – July 8

On or about June 15, Quinn met with CBRE employee Eva Deforest ("Deforest") regarding One Meadowlands. (Tr. 405-408). Deforest told Quinn that 300 Lighting Way was being purchased by Rugby Realty ("Rugby") and asked Quinn if EES was interested in doing the cleaning work, to which he responded "yes." (Tr. 406). Upon returning to EES's office that day, Quinn told Perilla to begin hiring eight (8) cleaners to staff 300 Lighting Way. (Tr. 483). EES was awarded the contract on or about June 20 with an expected start date of July 1.[18] (Tr. 406-407). Because of Perilla's vast referral source, he had no problem finding eight (8) cleaners. (Tr. 483).

On June 25, the Union wrote a letter to Rugby stating the 300 Lighting Way CRS cleaners wanted to work for the Company that was taking over the cleaning contract and included the signatures of eight (8) CRS employees. (GCX#19). The Union also circulated a flyer on June 25 emphasizing that the Cleaners were earning $12.80 and were slated to receive a forty-cent ($0.40) per hour increase to $13.20 just five (5) days later. (GCX#20).

On July 1, Quinn received a letter by email from the Union containing a list of the CRS cleaners and a request for applications (GCX#15, Tr. 421).[19] Quinn did not respond to the letter. (Tr. 437). Quinn also received a call from Maurice Adis, ("Adis"), a Rugby partner who instructed him to offer jobs to the existing CRS cleaners on his terms of $8.50 per hour with no benefits so as to avoid any issues with the Union. (Tr. 408). Adis asked Quinn to post a Notice at 300 Lighting Way advising the CRS employees that they were welcome to apply for jobs with

[18] EES did not begin until the night of July 8 because the closing date for the building sale changed a few times between July 1 and July 8 due to bank issues. (Tr. 408). In fact, EES went to 300 Lighting Way on the morning of July 7 to begin cleaning when Quinn was told that the closing was being delayed to the following day. (Tr. 413).
[19] The email was sent to Quinn's email address utilized by him on a daily basis. (Tr. 399; GCX #7).

EES. (Tr. 409). Quinn drafted a Notice in English[20] and the following morning posted the Notice on the men's room door at 300 Lighting Way per the direction of the building engineer. (Tr. 410). The men's room door was in close proximity to the janitorial closet. (Tr. 410).

The Notice read:

> Please be advised that on July 3rd Eastern Essential Services, Inc. will be taking over the cleaning for 300 Lighting Way. We are currently accepting applications for cleaners. You're welcome to apply in our offices.
>
> Eastern Essential Service, 122 Clinton Road, Fairfield, New Jersey 07004.

(Tr. 419). The Notice also included a phone number for EES. (GCX #21).

On July 3, Adis followed up with Quinn to see if any CRS Cleaners responded to the Notice. (Tr. 410). Quinn told him no, and a short time later, Adis instructed Quinn to go to the building and personally offer the CRS Cleaners jobs. (Tr. 411). Quinn immediately called Perilla and told him to go to 300 Lighting Way and offer jobs to the CRS Cleaners. (Tr. 411, 484).

Perilla arrived at 6:00 p.m. and asked the CRS Supervisor to meet with the cleaners. (Tr. 484). He met with the seven (7) or eight (8) cleaners on the second floor. (Tr. 484). Perilla told them that he was the Operations Manager from the new Company and that he was there to offer them jobs at $8.50 per hour for twenty (20) hours a week with no benefits. (Tr. 484). The CRS employees told Perilla that they had been working there for many years and were earning much more money. (Tr. 485). The CRS employees did not accept the job offer but instead told Perilla they needed to speak to CRS and the Union. (Tr. 485). Nevertheless, Perilla told them he would still give applications to anyone who was interested. (Tr. 485). A few said they would take the applications, and Perilla gave them applications. (Tr. 485). Perilla told them to bring them to

[20] Quinn wrote the notice in English because he does not speak Spanish. (Tr. 407). Although Marjorie in his office speaks Spanish, she was on maternity leave at the time. (Tr. 468).

EES's office. (Tr. 486). Perilla also gave them his business card so they had the address and phone number of EES's office. (Tr. 486). Perilla never agreed to pick up the applications at anyone's house. (Tr. 487).[21] Nor was he given anyone's address or phone number. (Tr. 487).

Perilla then left the building and immediately called Quinn. Perilla told him that the CRS cleaners did not want the job because of the $8.50 per hour wage rate, but that in any event, he gave applications to some of them. (Tr. 484, 486). Quinn confirmed that Perilla called him immediately after the meeting and told him that the CRS cleaners had not accepted the job because of the $8.50 pay rate. (Tr. 412).

Five (5) General Counsel witnesses testified as to what transpired on July 3, including two (2) witnesses, Garate and Brown, who were not even present when Perilla was at 300 Lighting Way. (Tr. 113-14, 73). All five (5) had different accounts, except that none accused Perilla of making a single statement about the Union. (Tr. 113-14, 73, 180-84, 581-83, 591-95). Former CRS cleaner Teresa Hernandez ("T. Hernandez") confirmed that Perilla met that night with CRS cleaners. (Tr. 180). According to T. Hernandez, Perilla opened the meeting by asking each of the former CRS employees about their years of service and pay rate. (Tr. 180). T. Hernandez testified that the former CRS employees told Perilla they were earning $12.80 and were about to get $13.20, to which Perilla responded that EES would only be paying $8.50 per hour with no benefits. (Tr. 181). Shop Steward Fanny Gramajo ("Gramajo") then left the meeting to call Garate and returned. (Tr. 182). The CRS cleaners told Perilla that "yes we do accept the applications." (Tr. 182). Perilla went to his car to get applications and told the group they could fill out an application. (Tr. 182). According to T. Hernandez, because they had no documentation, Perilla agreed to call each of them on Sunday and go to each of their houses to

[21] Quinn confirmed that an Operations Manager would never pick up applications at someone's home. (Tr. 459).

pick up the applications. (Tr. 183). Perilla was given a list with names and phone numbers. (Tr. 183).

Garate's testimony of the July 3 meeting with Perilla was based on a telephone call and in-person conversation with Gramajo.[22] (Tr. 113-14). Garate contradicted Hernandez in that, according to Garate, she and Gramajo spoke twice on the phone before Perilla had even started the meeting with the CRS cleaners. (Tr. 113-14). In fact, Gramajo told Garate on the phone that she did not have the chance to speak to Perilla because he was talking to the former CRS employees individually. (Tr. 114). Garate then went to 300 Lighting Way and met Gramajo after the meeting ended. (Tr. 114-15). Gramajo never told Garate that Perilla asked the former CRS employees about their years of service or their wage rate. (Tr. 115). Nor did Gramajo mention any list of names and phone numbers given to Perilla. (Tr. 115). According to Garate, Perilla only told them that the job would pay $8.50 with no benefits and that applications were provided. (Tr. 115, 124). According to Garate, Perilla was going to pick up the applications not on Sunday but on Saturday and was only going to one (1) person's house instead of each person's house. (Tr. 115). Garate refused to give a direct answer on whether the CRS employee accepted the $8.50. (Tr. 134-35). All she would say is that they "took the applications". (Tr. 134).

General Counsel's two (2) rebuttal witnesses contradicted both Hernandez and Garate and, amazingly, told the same exact story despite claiming they never spoke to each other or anyone else about their testimony and that they did not know the reason for their testimony. (Tr. 585-86, 605-08). In this regard, Orozco and Luciano testified that after Perilla told the group the salary was $8.50 per hour with no benefits, and the entire group responded "yes" to the offer

[22] Gramajo did not testify.

despite earning $13.20 per hour.[23] (Tr. 582, 593). Although Perilla had only three (3) applications, he photocopied the applications so as to have enough for everyone. (Tr. 582, 603). Orozco then filled out her application and gave it to Perilla, who then asked her for social security and green card. (Tr. 582, 592). According to Orozco and Luciano, the entire exchange – giving Perilla the completed application and the discussion about Orozco's social security card and green card – was witnessed by the entire group. (Tr. 587, 591-92). Perilla then told Orozco that he would pick up her documentation on Saturday or Sunday but no specific place was agreed upon. (Tr. 582-83). Indeed, both rebuttal witnesses testified – using the same language – that Perilla told them he would "pass by" either Saturday or Sunday to each CRS employees' house. (Tr. 583, 593). Everyone gave Perilla their home address. (Tr. 583, 595). Finally, Perilla told the group to start working on Tuesday evening, even though EES did not receive word until July 7 that the start date was being changed to July 8. (Tr. 588, 594, 413-14).

Additionally, Brown testified to what occurred based on a conversation with Garate. (Tr. 73). According to Brown, Perilla never had a meeting with the former CRS employees, no job offers were ever made, and, as such, none of the CRS cleaners accepted EES's offer to work for $8.50 per hour and no benefits. (Tr. 73).

On Monday July 7, EES was scheduled to begin cleaning 300 Lighting Way. (Tr. 487-488). Perilla arrived at 7 a.m. with Quinn, Pittinger and the EES Day Porter. (Tr. 413). There were two (2) CBRE employees, Serge the building manager, and a Hartz Mountain representative in the lobby. (Tr. 413). EES did not start cleaning because the closing on the building sale was delayed to the following day, which EES did not learn about until after arriving on July 7. (Tr. 413-14).

[23] Luciano wrote on his application that he wanted to be paid $13.20. (GCX #32). Luciano further testified that he did not remember receiving the second page of the application. (Tr. 601-02).

While in the lobby, Perilla saw the CRS day porter and, per Quinn's instructions, offered her a job at $12.00 per hour. (Tr. 488). She turned down the offer because the pay was not enough. (Tr. 488). Perilla never mentioned anything about the Union. (Tr. 488-89). Perilla immediately reported his conversation to Quinn: "Yes my boss was there and I said to him she doesn't want the job." (Tr. 489). Quinn corroborated Perilla's testimony that he was told the day porter declined the offer. (Tr. 414). Perilla did not return to the building until the night of July 8 when EES began performing cleaning services. (Tr. 489).

Maria De La Torre ("De La Torre"), the CRS day porter testified that she did speak to Perilla but changed her testimony on whether she spoke to him in the morning or afternoon. (Tr. 287). In fact, she didn't even know whether she spoke to Perilla on Monday July 7 or Tuesday July 8. (Tr. 287). According to De La Torre, the following exchange took place: After telling Perilla that the CRS workers had a union, Perilla responded that the owner [of the building] didn't want people in the union but still offered her a job at $10.00 per hour which she accepted.[24] Perilla also agreed to give her an application but never did so. (Tr. 279). De La Torre never asked when she should start working and nor did Perilla give her start date. (Tr. 278-79; 288). Perilla then came back the following morning with a day porter even though the closing for building sale had not yet taken place. (Tr. 281). DeLaTorre testified that Perilla asked her to train the day porter but she refused to do so. (Tr. 287).[25]

Garate confirmed Perilla's testimony that he offered De La Torre a job. (Tr. 132). Garate did not testify that Perilla said anything to De La Torre about the Union, nor did she testify that De La Torre accepted the job offer. (Tr. 132). Brown contradicted both Garate and

[24] In her August affidavit, there is absolutely no mention of Perilla making any statement about the owner not wanting people in the Union. (Tr. 292-93). Nor is there any mention of DeLaTorre telling Perilla how much she earned. (Tr. 292-93).

[25] De La Torre admitted on cross examination that Perilla was not there on both days. Indeed, her affidavit only made reference to July 7 and there was no mention of Perilla's request to train the day porter. (Tr. 292-93).

De La Torre. In this regard, despite talking to both Garate and De La Torre, he testified that De La Torre was never offered a job. (Tr. 72). According to Brown, he spoke personally to De La Torre, who told him that she was not offered a job by EES. (Tr. 71-72).[26] In fact, Brown testified that De La Torre told him that Perilla said "no" when she told him that "I really want to work here. Can I work here" and that because the building owner did not want a Union she was not being offered a job. (Tr. 72).

On the evening of July 8, EES began providing cleaning services at 300 Lighting Way with ten (10) cleaners including one supervisor, Reuben Galvez ("Galvez"). (Tr. 407-421). Upon arriving at 300 Lighting Way, Perilla saw the former CRS employees and Garate. (Tr. 489). Perilla told Garate that he had nothing to say and advised Serge, the building engineer, who called the police. (Tr. 489-90). Garate asked Perilla, "why didn't you give jobs to my employees[?]" (Tr. 489-90). Perilla responded that he did not have to talk to her and that he did not know anything (Tr. 490). The former CRS employees did not give Perilla any applications. (Tr. 490).

Four (4) witnesses for General Counsel testified regarding the conversation between Perilla and Garate on the evening of July 8 – and, as set forth below, all four gave different accounts as to what transpired.

Garate testified that she arrived at around 6:00 p.m. with seven (7) former CRS employees who all told Perilla to take the applications. (Tr. 116-17). According to Garate, Perilla responded that he had workers and that EES is not Union. (Tr. 117). T. Hernandez then told Perilla to please take the applications from everyone, which he did. (Tr. 117). Garate then asked if they were going to work, and he said "no" and would call. (Tr. 117).

[26] De La Torre did not mention in her testimony or affidavit that she ever spoke to Brown. (Tr. 272-310).

T. Hernandez did not corroborate Garate's testimony. According to T. Hernandez, Perilla was very angry and told them he lied about accepting the applications. (Tr. 185.) Nor did Perilla state that they would not work and that he would call them. (Tr. 184-85). Moreover, T. Hernandez never mentioned that Perilla said anything about EES not being Union. (Tr. 184-85).

Puerta-Gil, who was standing fifteen (15) feet away, testified that he saw Perilla take the applications and then showed them to him in the elevator. (Tr. 164). Luciano contradicted Garate, Hernandez, and Puerta-Gil. To that end, he testified that all seven (7) of the former CRS employees left the applications on a table, and Perilla took them off the table, not from the CRS employees. (Tr. 603-04). Orozco did not testify that she ever saw Perilla take applications from either the employees or off a table. (Tr. 580-89).

On July 9, Perilla went to 300 Lighting Way. (Tr. 490.) He never spoke to DeLaTorre. (Tr. 490, 524). DeLaTorre testified that although she accepted the job on July 7, Perilla again offered her a job immediately after telling her that the new owner did not want a Union. (Tr. 283, 304). She further testified that Perilla gave her an application at that time. (Tr. 283).[27] DeLaTorre did not ask Perilla when she should start working. (Tr. 288). Although there was no mention in her affidavit about going to EES on July 9, DeLaTorre testified that she went to EES's offices on that day and on July 16 to bring her completed application. (Tr. 297, 298-99). EES never received an application from De La Torre (RX #3).[28]

Hernandez and Garate testified that former CRS employees went to EES's offices on July 9 and 10 to make sure the Company had the seven (7) applications that were allegedly given to Perilla on July 8. (Tr. 119, 186). EES only received applications from three (3) former CRS 300

[27] DeLaTorre testified that she heard the Day Porter Perilla brought on Monday had to go to Colombia on an emergency. (Tr. 292). Perilla testified that the Day Porter did have to go to Colombia. (Tr. 523-24). There is no mention in her affidavit regarding a conversation with Perilla on July 9 about the Day Porter going to Columbia. (Tr. 302-303).

[28] DeLaTorre testified that she went with Mooney from the Union. (Tr. 299-300). Mooney did not testify.

Lighting Way employees: Maria Victoria, T. Hernandez and Fanny Gramajo – two (2) of which were not completed until after July 8. Indeed, Victoria's is dated July 28 and Gramajo's was dated August 15. (RX #3).

DISCUSSION

I. EES DID NOT DISCRIMINATORILY REFUSE TO HIRE THE FORMER EMPLOYEES AT 120 MOUNTAINVIEW, ONE MEADOWLANDS OR 300 LIGHTING WAY AND, THEREFORE, HAD NO DUTY TO RECOGNIZE AND BARGAIN WITH THE UNION

"Where the bargaining unit remains unchanged and the successor employer hires a majority of the predecessor's employees which are represented by a certain bargaining agent, the new employer has a duty to bargain with the incumbent union." Garden Grove Hospital & Medical Center, 357 NLRB No. 63 (2011) (citing NLRB v. Burns International Security Services, 406 U.S. 272, 281 (1972)). "[A]n employer need not offer employment to its predecessor's employees as long as it is not motivated by discriminatory reasons." Global Industrial Services, Inc., 328 NLRB 264 (1999). Moreover, "there is no obligation on the purchasing employer to initiate an employment relationship with the predecessor's employees...." R&L Cartage and Sons, Inc., 292 NLRB 530 (1989). However, majority status will be established if the alleged successor engaged in discriminatory hiring practices. GFS Building Maintenance, Inc., 330 NLRB 747, 752 (2000).

To establish discrimination in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by antiunion animus. Planned Building Services, 347 NLRB 670 (2006). In determining whether union animus was the motivating factor, the Board considers the following factors on a case-by-case basis:

- Substantial evidence of union animus;

- lack of a convincing rationale for refusal to hire the predecessor's employees;
- inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; and
- evidence supporting a reasonable inference that the new owner conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of the new owner's overall work force to avoid the Board's successorship doctrine.

Id. at 673-74. Once the General Counsel has shown that the employer failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. Id.

II. GENERAL COUNSEL CANNOT ESTABLISH A *PRIMA FACIE* CASE OF DISCRIMINATORY HIRING AS TO ANY OF THE THREE (3) BUILDINGS

In cases where the Board finds a *prima facie* case, the evidence is extensive and compelling. For example, in Massey Energy Co., 358 NLRB No. 159 (2012), where the Board held that the Respondent violated 8(a)(3) by failing to hire the incumbents, the managers *admitted* their animus in testimony:

> Mammoth's **managers testified that their antiunion bias tainted their decisions** not to hire certain discriminatees. Mammoth's prep plant superintendent, John Adamson, testified that one of the main factors that made him unwilling to hire local Union President William Willis was Willis' statement that he intended to organize on behalf of the Union if hired. Similarly, Mammoth's President, Dave Hughart, testified that he considered Dwight Siemiaczko to be a poor candidate for employment in part because he had said that, if hired, he would "make every effort to organize."

at slip. op. 4-5.

Moreover, "the numerous pretextual reasons proffered by Mammoth in defense of its hiring decisions provided further convincing evidence of its unlawful motives." Id. In this regard, "Mammoth argued generally that its hiring decisions were based on a desire to attract the most qualified possible work force," but the Company hired 19 inexperienced miners instead of

the experienced predecessor miners. Id. Moreover, the employer's explanation that it hired based on an "alleged policy of preferring to hire inexperienced individuals whom it can train to follow its own practices and become productive miners" was undermined by a lack of documentary evidence combined with an "intermittent[], rather than strict[]" policy application. Id. Furthermore, the evidence showed that the trainees were being hired "to fill positions until the Respondents could hire enough experienced miners." Id. The company also claimed that it had an unwritten policy of offering jobs to miners from other company facilities so those miners could work closer to home, but its witnesses gave contradictory testimony on this point, and the Company provided no evidence that any transferred miners' commute times were reduced. Id. Moreover, the mine from which miners were transferred had an "acute" shortage of miners. Id. Id. And as to the final *prima facie* PBS factor, evidence established that the company staffed the location with a design of hiring a minority of predecessor employees: "... the Mammoth managers in charge of hiring were acutely aware of the need to keep track of how many members of the Horizon bargaining unit they hired, so as to ensure that Mammoth did not incur a bargaining obligation." Id. slip op. at 4.

Likewise, in Pacific Custom Materials, Inc., 327 NLRB 75 (1998), the ALJ described overwhelming evidence relating to the *prima facie* factors. Indeed, the successor's agents made numerous, blatant antiunion statements, which amounted to "an outright confession" that the employer was attempting to avoid hiring a majority of the incumbents. Id. at 84. In this regard, the Respondent's Vice President told the predecessor's managers that it "would be nonunion and would be breaking up the union," and another employer representative "made numerous statements revealing an unlawful intention to limit the hiring of the former union-represented employees" including that hiring would be "a numbers thing" and that "he had been told he

could only hire 49 percent of the former plant employees," which was "lowered to 46 percent." Id., at 75, 84. Moreover, "he could only hire a percentage of the employees because Respondent did not want the Union back in." Id. at 84. Another of the respondent's agents "said that qualifications did not matter because Allen had been given orders to hire back less than 50 percent of Port Costa's employees." Id.

In addition, the respondent created lists from which he "constantly check[ed] the percentage of 'union' employees..." Id. Finally, the respondent's hiring practices at the union facility differed from those it used at nonunion facilities:

> Respondent's hiring practices at Port Costa, the union facility, differ from the Olancha and Frazier nonunion facilities. At the nonunion, facilities Respondent hired the former PLA employees. At those facilities Respondent did not seek more applicants by a second round of newspaper advertisements. Further, Respondent's hiring practices at the Port Costa facility differ between union and nonunion employees. Respondent hired, with one exception, the nonunion administrative employees at Port Costa. It appears Respondent did not even interview outside applicants for these nonunion positions. The two nonunion mechanics were hired before union mechanics who were listed higher on Allen's list of employees ranked by importance to the operation. As noted earlier, Allen's various lists of potential hires reveal that Allen was particularly concerned with the percentage of union employees that he hired. Allen drew a distinction between the two nonunion mechanics and the union members. The evidence establishes that the strongest motive in Respondent's hiring decisions was to avoid hiring as a majority of its employees the Port Costa production and maintenance employees represented by the Union.

Id.

Likewise, in CNN America, Inc., 361 NLRB No. 47 (2014):

> **The evidence of animus in this case is overwhelming, as is the evidence that CNN's explanations for its conduct were pretextual.** Substantial evidence of CNN's union animus is its termination of the ENGAs. The employees at the DC and NYC bureaus had lived through substantial technological changes, most notably going from videotape to digital media, and then from digital to HD, with ever increasing reliance throughout on sophisticated computer programs. As stated above, CNN never terminated or directed the termination of any TVS unit employee for failing to keep up with those changes or inability to perform the work.

> And when it terminated the TVS contracts, after secretly deciding to do so, CNN personnel went out of their way to praise the abilities of the two bargaining unit work forces. **In the face of that evidence, CNN's claim that it brought the work in-house in order to keep up with technological change was, as the judge found, pretextually false.**
>
> The **numerous 8(a)(1) statements** made by CNN officials also establish union animus. They complained repeatedly about the labor costs and "rules and regulations" imposed on CNN by virtue of the collective-bargaining agreements with the Union. And, as illustrated above, when the termination of the ENGAs was announced, they repeatedly told TVS employees that operations under CNN would be "nonunion."
>
> The evidence concerning CNN's staffing of the DC and NYC bureaus, however, provides the principal evidence of its unlawful discrimination against TVS employees in order to avoid a successorship bargaining obligation. As shown above, CNN, which plotted the termination of the ENGAs in secret, deliberately changed every bargaining unit job and position qualification with the expressed purpose of getting out from under the Union's jurisdiction. The change also had the effect, no doubt intended, of minimizing the significance of the bargaining unit employees' prior experience when they applied for the "new" jobs.
>
> As the record also shows, once the actual hiring began, there were numerous instances of interviewing/debriefing/hiring disparities that adversely affected TVS applicants. In every job category, as detailed in the judge's decision, hiring managers ignored ostensibly governing protocols intended to ensure the objectivity of the behavioral interviewing process.
>
> * * *
>
> There is little evidence that any of CNN's hiring managers consulted with CNN producers, editors and reporters who were familiar with the work of the TVS cameramen. But when they did so, they ignored favorable assessments they received. Hiring managers, however, had no hesitation in soliciting favorable assessments of non-TVS applicants.

Id., slip op. at 24-25. Moreover, a hiring consultant testified that the candidate scores she created for applicants based on interviewers' notes were changed by management and that she was instructed to use personal references for non-predecessor employees whose professional references were negative. Id., slip op. at 25. Furthermore,

> Many CNN employees applied for the jobs in DC and NYC, and CNN hired every one of them. It allotted and paid relocation expenses for senior photojournalist candidates, ranging from $8000 for those from domestic bureaus, to $11,000 plus for those from its London bureau. It had difficulty getting U.S. work authorizations for some of its international candidates and ultimately hired an expert to handle the immigration and visa issues. Meanwhile, it did not hire about 55 of 120 TVS bargaining unit employees in NYC, and about 38 of 86 TVS bargaining unit employees in DC, all of whom were performing the very work that CNN was going to continue, some of them with many years of experience handling the bureaus' most important assignments. Although CNN managers who supervised TVS' most active union members at the DC bureau praised them as some of TVS most skilled technicians, CNN did not hire any of them.
>
> As also illustrated above, CNN's focus on "growth" candidates led to unusual hiring decisions. Growth candidates, many lacking in the skills necessary for their positions, were often hired over much higher-rated TVS employees. Like the judge, we regard CNN's emphasis on growth candidates as a poorly concealed effort to refuse to hire TVS employees.

Id., slip op. at 26. Additionally, "...CNN conducted its hiring process....to ensure that the number of TVS employees that it hired would not constitute a majority of the larger unit that it believed appropriate." Id., slip op. at 36 fn. 36. See, also, Shortway Suburban Lines, Inc., 286 NLRB 323 (1987) (employer admitted it decided not to hire the incumbent employees only after it knew of union affiliation, had past practice of preferring experienced employees to inexperienced employees off the street, did not follow past practice of hiring predecessor employees, made incumbent employees fill out applications in contrast with normal practice, deviated from practice of hiring most of predecessor's employees at other locations); JAG Healthcare, Inc., 359 NLRB No. 88, slip op. at 27 (2013) (anti-union statements by employer representatives that the union would not be representing its employees, employer statements explicitly linking company's non-solicitation policy to the union, employer encouraged staff to call police on union organizers, statement by employer to effect that company intended to discriminate in hiring based on union affiliation, hiring based on roster that noted union

affiliation, employer monitored union press conference and wrote up employee who stated that she had wanted to attend, employer notes reflected that predecessor employees who did not support the union were "good"); The Parksite Group, 354 NLRB 801, 804 (2009), (employer offered jobs to 15 non-predecessor employees and 14 predecessor employees, gave false non-discriminatory reasons for its hiring, hired 11 non-predecessor applicants a hiring consultant had deemed "unemployable" based on an employment test, and gave preference to the predecessor's employees at other locations); U.S. Marine Corp., 293 NLRB 669, 670 (1989)[29].

In sum, in cases where the General Counsel establishes a *prima facie* case, there is clear, multi-faceted evidence as to *all* of the following:

- Multiple statements evidencing blatant antipathy toward the union and a design to hire a minority of the incumbents;
- Reasons for not hiring that were unsubstantiated and disproven at trial, i.e., pretext;
- Hiring practices that differed from those used at other locations;
- Scheming to manipulate the number of incumbents hired.

In this case, General Counsel's allegations themselves, even if true, would not provide evidence of the type or *extent* of animus cited above. More importantly, he failed to prove evidence of any animus at any of the three locations at issue here – and certainly not the compelling multiplicity of evidence cited above. First, as to 120 Mountainview, General Counsel does *not even allege* in the Amended Complaint a single demonstrated act of animus by

[29] The respondent rehired a majority of the predecessor's employees but stopped at the point that they would become a majority of its enlarged "fabricat[ed]" bargaining unit. Id. at 671. The Board found that the respondent's failure to rehire remaining employees of the predecessor "was a necessary and integral part of the Respondents' attempt to avoid an obligation to recognize and bargain with the Union" and violated Sec. 8(a)(3) and (1). Id. In this regard, the respondent advanced no legitimate reason for not hiring the remaining employees – whose "skills, abilities, and versatility and other work-related characteristics" were no different than the predecessor employees who were hired. Id.

EES. To the contrary, the only "anti-Union" statement that any General Counsel/Charging Party witness alleged was double-hearsay testimony about what *non*-EES employees told the former employees and Union representative on May 15.

As to One Meadowlands, General Counsel claims that Perilla's alleged statement to Puerta Gil that EES is non-Union constituted a threat. Perilla denies making such a statement, and he should be credited given the obvious bias of Puerta-Gil, who is neighbors and friends with one of the Union's representatives and, moreover, threatened to sue the Company for unjust termination. Simply put, there was no reason for Perilla to even make such a statement given that Perilla was there to give him a job in the first place. Notwithstanding, even if Perilla said what Puerta-Gil alleges, it was a mere factual statement unaccompanied by any threat and, as such, not unlawful. P.S. Elliott, 300 NLRB 1161 (1990). Next, General Counsel will rely on Bautista's incredible testimony that Castro – who had never before met her – blurted out of the blue that she was not being hired because of the Union, a story that makes absolutely no sense. But even if Castro did make such a comment, which he did not, in contrast to the litany of evidence in the above-cited cases, an off-hand, single statement manifestly is not "substantial." In short, there is no credible animus evidence at One Meadowlands either.

Finally, General Counsel is without evidence of animosity at 300 Lighting Way. In this regard, General Counsel will try to demonstrate that EES withdrew accepted employment offers, that Perilla made anti-union statements to the incumbent day porter, and that the incumbent employees gave applications to Perilla on July 8, which the Company disregarded. However, as set forth in full detail below, Perilla's testimony, corroborated by Quinn, that the incumbents rejected his employment offer should be credited given that the varying stories told by the General Counsel's witnesses. Likewise, Perilla offered the day porter a job, which she rejected,

as opposed to her incredible testimony. Furthermore, General Counsel's witnesses' testimonies about the events of July 8 do not add up.

In light of the foregoing, and as described fully below, there is no direct animus evidence regarding any of the three locations. Moreover, no other factors – which feature so prominently in the above cited cases – are present here. Indeed, in those cases, the employers, who treated the incumbent union employees differently than at other locations, claimed multiple pretextual reasons for not hiring incumbents. Here, the Company witnesses' unrebutted testimony shows that EES staffed the facilities the same way it has staffed all its facilities for the past 12 years, meaning there is no pretext or inconsistent hiring practices. Indeed, the entire reason the Charge was made against the Company was that EES simply applied the same hiring procedure it employs in non-union settings to locations where the incumbent employees were Union members! Thus, EES staffed according to its long-standing neutral hiring practice – not pursuant to a design to staff the facilities with a minority of predecessor employees. There is no *prima facie* case here.

A. There Is No Substantial Evidence of Animus At Any Location.

As to the first factor enunciated in Planned Building Services, 347 NLRB 670 (2006), there is no evidence – let alone substantial evidence – of animus at any of the three locations.

1. There Is Nothing In The Record Demonstrating Animus by EES at 120 Mountainview.

First, General Counsel failed to *even allege* any direct evidence of animus at 120 Mountainview. Indeed, the Amended Complaint refers only to alleged anti-union statements regarding One Meadowlands. Moreover, during trial, General Counsel and Charging Party failed to provide any arguable animus evidence at 120 Mountainview. To that end, and according to the General Counsel's own witnesses, there was absolutely no contact between any

EES representative and any former CRS employees or Union representatives on May 15, the "flip day." The only testimony the General Counsel could muster on this point was conflicting testimony from Sanchez and Feo Hernandez that a security guard – male, according to Feo Hernandez and female, according to Sanchez – told Sanchez that either the building manager (according to Sanchez) or the "owner of the building" (according to Feo Hernandez) did not want a union. Of course, neither the security guard nor the building manager is employed by EES. Thus, to put it mildly, the General Counsel's double-hearsay, inconsistent testimony alleging that a security guard not employed by EES told Sanchez that a building manager not employed by EES made an anti-Union statement is useless. *No one from EES said anything at all to Sanchez.* Furthermore, the record is bereft of any other direct evidence that could even arguably constitute union animus at 120 Mountainview.

2. There Is No Credible Evidence of Animus at One Madowlands.

a) Perilla Did Not Threaten Puerta-Gil.

As with 120 Mountainview, General Counsel failed to adduce any credible direct union animus evidence by EES at One Meadowlands. First, in the Amended Complaint Paragraph 10, General Counsel alleges that "...Perilla, at an unnamed restaurant in Paterson, New Jersey, impliedly threatened its employees at Respondent's One Meadowlands Plaza....location that it would not operate as a union facility." But Puerta-Gil testified only that when he met Perilla at the bakery and asked Perilla why EES paid "so little," Perilla replied that: "That was what the company paid. The company didn't have a union and they were not able to pay more." (Tr. 145, 146). Perilla, of course, testified credibly that he never even mentioned a union – and as set forth supra, Puerta-Gil's overall testimony should be discredited. Regardless, even assuming, *arguendo* that Perilla did say that "the company didn't have a union," this mere factual statement

unaccompanied by any threats, interrogation or unlawful coercion is not unlawful. P.S. Elliott, 300 NLRB at 1162.[30]

b) Castro Did Not Threaten Bautista.

Next, General Counsel will rely on former CRS day porter Bautista's testimony that a "Hispanic" EES representative – who was never actually identified, but who General Counsel will argue was Castro – told her on June 27 that the Company would not hire her because of her Union affiliation. But Bautista's testimony on this point is incredible: the "Hispanic guy" just blurted out EES's allegedly discriminatory motive, without provocation and for no reason, before even exchanging pleasantries with Bautista. It makes no sense that Castro would say such a thing. Indeed, what General Counsel is asking the ALJ to believe is that Castro knew EES was doing something wrong – discriminating against Union employees – and casually volunteered this fact in the first sentence he spoke to Bautista, a complete stranger. Inconceivable.

From there, Bautista's testimony piles on the implausibility: rather than protest the Hispanic guy's statement, she just replied "Okay," and then he apologized, which she never

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[30] In P.S. Elliott, in response to questions from displaced employer's workforce about whether the new jobs would be union, the employer representative replied "we are a non-union company." The statement was not accompanied by any threats, interrogations, or other unlawful coercion and was, like Perilla's alleged statement, "a truthful statement of objective fact," and, therefore, not unlawful. Id. See, also, Brown & Root, Inc. v. N.L.R.B., 333 F.3d 628 (5th Cir. 2003) (employer representative's statement that the employer "'was a non-union company and was going to stay that way, and that 'if the [ ] employees came to work for them they would be non-union'" did not violate the Act where unaccompanied by "any independent violations of labor law.") Perilla's alleged statement is manifestly different from statements in cases General Counsel is likely to rely on in that in those cases, the employers stated that the company was and would continue to be non-union. In other words, in those cases there is an implicit threat that organizing would be futile. Eldorado Inc., 335 NLRB 952, 953 (2001) (statement by employer in response to question by prospective employees about "retaining the union" that "the business **would be** non-union." Board reiterates that such comments made by a potential successor employer, who does not know whether it will hire a majority of the predecessor's employees, tells applicants that **it will be** nonunion, it indicated that it intends to discriminate against the predecessor's employees to insure its non-union status); Smoke House Restaurant, 347 NLRB 192, 193, 203 (2006) (statement that employer was a non-union restaurant and that it would not be a "union house"); Advanced Stretchforming Inc., 323 NLRB 529, 530 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000) (informing potential applicants for employment that it intends to operate nonunion, unlawful, and coercive. Board observes, "A statement to employees that **there will be no union** at the successor employer's facility blatantly coerces employees in the exercise of their Section 7 rights to bargain collectively through a representative of their own choosing and constitutes a facially unlawful condition of employment."); Commercial Erectors, Inc., 342 NLRB 940, 942 (2004) (statement to job applicants that company will not go union, unlawful threats that attempts to unionize employer would be futile).

stated in her affidavit. Moreover, despite being briefed on the previous day's meeting the Union had with her fellow CRS employees – during which they were told about the Union's efforts to retain their jobs – Bautista testified that she never reported to the Union the alleged blatant admission that EES was not hiring her because of the Union. So, the Union had sounded the war drums, Bautista had heard the call, and yet she let this alleged blatant guilty admission go unreported? Unbelievable.

In light of the above, the entire alleged exchange as told by Bautista is nonsensical and should be discredited. On the other hand, Castro's testimony on this point – that he never interacted with Bautista that day – was entirely credible. First, Castro – who was busy unloading equipment and prepping for the job – had no reason to interact with Bautista in the first place and never did. Moreover, Quinn's testimony was that he had no memory of seeing the CRS day porter at the time. In addition, Castro testified without rebuttal that he never hires the predecessor's employees, unless otherwise told to do so. So there was nothing different about the staffing for this job than any other. He came in with a new crew, like he always did, and did not hire incumbent employees, like he always did, union or no union. In other words, Bautista was being treated just like all the other incumbents before her – and, thus, even if he had spoken to her, Castro would have had absolutely no reason whatsoever to refer to the Union in the first place. In light of the foregoing, credibility weighs overwhelmingly in favor of EES: neither Castro nor anyone else told Bautista she was not being hired because of the Union.[31]

[31] Alvarado's testimony that on the afternoon of June 27 an EES employee told Garate the CBS employees were not being allowed in because "we had the union" should be dismissed out of hand. First, she was contradicted by Garate's testimony that the alleged EES representative said nothing about the union. Moreover, after testifying about the statement to Garate, Alvarado testified she could not hear what the EES representative said to Garate.

In light of the above, General Counsel and Charging party provided no credible direct evidence of animus at One Meadowlands.[32]

3. *There Is No Credible Evidence of Animus at 300 Lighting Way Because Perilla (a) Made Job Offers On July 3 That Were Declined; (b) Offered De La Torre A Job On July 7 That Was Declined; (c) Perilla Never Spoke to De La Torre On July 9; and (d) Perilla Was Not Given Any Applications on July 8.*

As evidence of animus, General Counsel alleged at the Hearing that EES offered CRS cleaners jobs, which were accepted and then withdrawn because of the Union. The problem with General Counsel's theory is that it is unsupported by the record evidence. Perilla testified credibly that the job offers were rejected, which was confirmed by Quinn, who spoke to Perilla immediately after the July 3 meeting between Perilla and the CRS cleaners. Indeed, as Perilla reported to Quinn, the terms offered were not accepted by the CRS cleaners because the wage rate was too low and all benefits were being eliminated. In fact, as described below, General Counsel's own witnesses in its case in chief corroborated Perilla on this point. The two (2) rebuttal witnesses' testimony was not only at odds with the Company's witnesses, but also contrary to the testimony of Hernandez, Garate and Brown – and, thus, inherently suspicious. As to the Day Porter, she was confused as to the days and times she spoke to Perilla, her testimony was irrational, and critical testimony was nowhere to be found in her contemporaneous affidavit.

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[32] General Counsel and Charging Party may try to argue that animus is evident because when Alvarado and other former CBS employees went to EES a week after EES took over the cleaning services, they did not receive applications. First, events occurring weeks after EES hired its employees for the job cannot be evidence of animus at the time EES staffed the job. Second, this is a refusal to hire, not a refusal to consider case, and, to that end, General Counsel did not allege a refusal to consider in his Complaint. In any event, General Counsel's very own witness's testimony evidences that the former CRS Union employees were treated better than an applicant off the street with no Union affiliation. Indeed, as Collado testified, the first time the group went to EES, she stayed behind when the former CRS employees went in wearing their Union shirts. When they returned without applications, she waited and then went in without a Union shirt, with everyone expecting that she would receive an application. Instead, just like the former CRS employees, she did not receive an application. But unlike the former CRS Union employees who received applications the following week, when Collado went back on her own two weeks later, the office worker was "nasty" and told her "we're not hiring." So the General Counsel's proffered testimony on this point proves only that the Union-affiliated applicants were treated better than a non-affiliated off-the-street applicant – proving there is no animus here.

Regarding the applications, testimony that CRS Cleaners gave them to Perilla on July 8 was contradictory and conflicts with the documentary evidence. Simply put, the record evidence is overwhelming that the CRS cleaners, including the Day Porter, declined Perilla's job offer.

a) The CRS Employees Denied Perilla's Employment Offer

Perilla's testimony that the CRS cleaners declined his July 3 employment offer should be credited:

- Perilla testified that in the meeting with the CRS night cleaners on July 3, he made job offers at $8.50 per hour with no benefits. His testimony regarding their collective response made perfect sense: they worked at 300 Lighting Way for many years, made a lot more money, and needed to talk to their employer and the Union. In other words, nobody accepted the offer. To this end, as both Perilla and Quinn testified, immediately after leaving the meeting, the first thing Perilla did was call Quinn and tell him that the offers were rejected because the $8.50 per hour wage rate was too low. The fact that Perilla made no anti-union statements at the July 3 meeting only confirms that Perilla had no reason to lie about what transpired. That Perilla gave applications to some of the CRS cleaners at their request is of no consequence. Taking applications does not equate to accepting the terms of employment offered. Indeed, two of the applications that EES received list $12.80 and $13.20 per hour, respectively, as the salary desired.

- General Counsel is asking the ALJ to believe that the CRS cleaners – after telling Perilla about their long tenures with CRS – accepted a nearly five dollar per hour reduction when they were just days from a 40-cent per hour increase. Not only were they offered a substantial pay cut, but all of their benefits including health, vacation, and sick and personal days were being completely eliminated. It is simply incredible to believe that these terms were accepted by the CRS night cleaners that night. Indeed, the entire focus of the Union's June 25 Flyer was to tell the public that the CRS cleaners were earning $12.80 per hour with a scheduled increase to $13.20 – and to convey the obvious point THAT WORKING FOR LESS WOULD BE UNACCEPTABLE!

- In addition to Quinn, General Counsel's own three (3) chief witnesses corroborated Perilla's testimony that the CRS cleaners did not accept Perilla's offer. First, T. Hernandez never testified that the group said "yes" to the offer – only that the group accepted the applications. And, according to her, no one asked for a start date, and Perilla never told them when to begin working – a key fact that certainly would have been discussed upon the acceptance of job offers. Although Garate's testimony was complete hearsay (i.e., what Gramajo told her) and should be given no weight, she too said that the group accepted only applications, *not* that they accepted the job offers on the terms proposed by

Perilla. Her testimony on this point is entirely consistent with the Union's letters to EES, each of which inquired only about the application process.

Moreover, the conclusion that Gramajo told Garate only that the applications were accepted – not the jobs – is inescapable considering Brown's testimony, which would have been completely different if the CRS cleaners accepted jobs. In this regard, Brown testified that he received information about what transpired on July 3 from Garate, who received her information from Gramajo. And Brown testified not that offers were accepted, but that no offers were even made (contradicting all witnesses). If Gramajo told Garate that the job offers were accepted, without doubt Garate would have reported same to Brown, who would have been unwavering during his testimony that the CRS employees accepted the offers, which were withdrawn because of the Union. Thus, Brown's testimony is compelling evidence that job offers were not accepted.

- General Counsel will likely next argue that the job offers were accepted because Perilla agreed to pick up the applications over the Holiday weekend. However, Perilla credibly testified that he did not agree to do so, and Quinn confirmed that an Operations Manager would not go to someone's house to pick up applications. Further, Perilla could not have done so without a list of phone numbers and addresses, which he was never given. On this point, General Counsel's witnesses could not get their stories straight. First, Perilla was going to one person's house on Saturday. Then, wait, no, he was going to eight (8) houses on Saturday and Sunday. Was Perilla given just a list of phone numbers or was it a list of phone numbers and addresses as well? In any event, it is absurd to believe that Perilla would be spending the July 4 Holiday weekend driving to the CRS cleaners' houses to pick up applications, which, of course, he testified he never agreed to do. Indeed, he specifically told them that the applications had to be brought to the EES's office, which is exactly the reason he gave out his business card with the address.

- After both parties' cases in chief were completed, General Counsel was left with five (5) witnesses who testified that no job offers were accepted. So in a desperate attempt to discredit Perilla, General Counsel scrambled to find two (2) rebuttal witnesses who miraculously appeared to provide General Counsel with the testimony he failed to elicit in his case in chief. Indeed, their respective testimonies are suspicious at best. In this regard, Luciano and Orozco both testified that they had not spoken to each other or anyone from the Union about the substance of their respective testimonies, but then provided identical details that T. Hernandez never mentioned: the photocopying, Orozco completing an application and giving it to Perilla after a discussion about a social security and green card, and the instruction to start working on July 8. Then they used the same exact language to describe their understanding with Perilla (i.e. that he would "pass by" their homes to pick up applications.) Futher, EES does not have an application from Orozco, which is another reason to discredit her testimony. Finally, they both testified that the entire group in unison said "yes" to the job

offers, even though they were taking a five dollar pay cut and losing their benefits, which contradicted General Counsel's three (3) previous witnesses, including T. Hernandez, who was at the meeting and surely would have remembered such a critical fact during her own testimony. Indeed, Lucianos' testimony on this point is especially puzzling in light of his one-page application on which he wrote $13.20 as his desired salary. Indeed, if, as he testified, the $8.50 offer was acceptable, then he would have written $8.50 on the application. Finally, to complete their fabricated testimony, both rebuttal witnesses said that Perilla gave them a July 8 start date, which would have been impossible, unless Perilla can see the future better than Nostradamus. Indeed, Perilla did not know until sometime on July 7 that the actual start date was July 8. Thus, Perilla would have never made such a statement. To say the least, the rebuttal witnesses' testimony does not pass the smell test and should be discredited.

b) On July 7, Perilla offered De La Torre a job at $12.00 per hour, which she rejected.

The record evidence overwhelmingly supports Perilla's testimony that De La Torre rejected his job offer, not De La Torre's version of events.[33]

- First, there can be no dispute that Perilla offered her a job. Both De La Torre and Garate confirmed that was the case. Next, the ALJ should find that Perilla offered her $12.00 given that is what the EES Day Porter was being paid. There was no reason not to offer De La Torre the same wage rate.

- Second, the ALJ should find that Perilla never made any statement about the building owner not wanting the Union given that her testimony was contrary to her affidavit, illogical and not corroborated by Garate. De La Torre's affidavit was given just one (1) month after her conversation with Perilla. If De La Torre was able to recall this significant fact six (6) months later, then surely it would have been fresh in her mind when she was asked about the encounter in August – and would be reflected in the Affidavit. Its absence in the Affidavit leads only to the conclusion that her testimony on this point was fabricated. Likewise, if Perilla made the statement, surely De La Torre she would have immediately told Garate, who surely would have remembered and testified to such a crucial point, which she did not.

  Moreover, Perilla's July 3 meeting with the CRS cleaners casts serious doubt over De La Torre's claim. The five (5) General Counsel witnesses never testified that

[33] De La Torre could not recall whether she spoke to Perilla on July 7 or July 8 or whether it was in the morning or afternoon. She finally admitted that it was July 7 when confronted with her affidavit. Thus, ALJ should discredit her testimony that Perilla asked her on July 8 to train the day porter. The fact is that Perilla was not even there during the day of July 8 because the building sale did not close until that day and EES was not set to start cleaning until that evening. As such, there was no reason for Perilla to be at 300 Lighting Way during the day on July 8.

Perilla made any anti-union statements during the July 3 meeting. Thus, it makes no sense that Perilla would tell De La Torre such a thing a few days later.

Indeed, the alleged statement defies logic given that the only reason Perilla was offering her a job in the first place was *because EES was told to do so by the owner*, who wanted to avoid problems with the Union. Similarly, what De La Torre claims was said by Perilla after making this statement is nonsensical. According to De La Torre, Perilla told her she would not be hired because of the Union, but offered her a job anyway. If the substance of the conversation as told by De La Torre were true, the last thing Perilla would have done is offer her a job – just like Brown said. Indeed, according to Brown, De La Torre personally told him that Perilla would not offer her a job because the building owner did not want the Union. In any event, the ALJ should discredit Brown's testimony because he completely contradicted De La Torre (who never testified that she spoke to Brown), Garate, Perilla and Quinn, who each testified that a job offer definitely was made.

- Third, the ALJ should find that De La Torre declined the $12.00 per hour offer. Indeed, as both Perilla and Quinn testified, immediately after speaking with De La Torre, Perilla told Quinn that she declined the job. Moreover, the absence in Garate's testimony that De La Torre accepted the offer is compelling evidence she declined the offer. In this regard, De La Torre surely would have mentioned to Garate that she accepted the job. Moreover, De La Torre's testimony that she never asked Perilla when she should start and never received a start date is further evidence that she declined. De La Torre knew she was losing her job. In this circumstance, if she had in fact accepted, the first thing she would have asked is "when can I start?" De La Torre also testified that she told Perilla she was earning $12.80 per hour, of which there is no mention in her Affidavit. Notwithstanding, her testimony that she was offered $10 per hour further undercuts her testimony that she accepted the job. Indeed, if that was actually the case, she had more reason to turn down the job – another reason to discredit her testimony.

c) Perilla Never Spoke to De La Torre On July 9.

The ALJ should credit Perilla's testimony that he never spoke to DeLaTorre on July 9:

- In this regard, there was no reason for Perilla do so, given that De La Torre already declined the offer and that Perilla brought the EES Day Porter with him that day.

- Similarly, De La Torre claimed that the same illogical exchange that took place on July 7 occurred again on July 9. According to De La Torre, Perilla told her the building owner did not want the Union and then still offered her a job. As such, the ALJ should find that no conversation ever took place on July 9 between Perilla and De La Torre.

- Moreover, De La Torre claims that Perilla gave her an application on July 9 which she completed and brought to EES's office that day. Putting aside the fact that there is no mention in her affidavit that she even went to EES on July 9, EES does not have an application from her. Thus, if the conversation took place as claimed by De La Torre, EES would have her completed application. To this end, De La Torre claimed that she also completed a second application at EES's office on July 16, which does not exist – further proof that De La Torre should be discredited.

- Finally, General Counsel will likely argue that a conversation took place between Perilla and De La Torre on July 9 because De La Torre knew that the Day Porter from Monday went to Columbia. However, she never testified that Perilla told her directly. All she testified to was that she heard the Day Porter went to Columbia. There is no mention in her affidavit that it was Perilla who told her about the Day Porter going to Columbia. Thus, it is clear that she must have heard it from someone else, such as the building engineer, Serge.

d) Perilla was not given any applications on July 8.

Simply put, on July 8, Perilla told Garate that he had nothing to say to them and advised Serge, the building engineer, who called the police. That was the extent of the conversation, and Perilla received no applications:

- General Counsel's witnesses' testimony on this point is contradictory and cannot be reconciled with the documentary evidence. To this end, Garate testified that Perilla told the group EES was not union and that the group was not to work for EES, but that he would call Garate. T. Hernadez's story was completely different. According to her, Perilla was very angry and said he lied about accepting the applications.

- Garate and T. Hernandez testified that Perilla eventually took seven (7) applications from CRS cleaners, and Puerta Gil said the same thing. To begin with, Puerta Gil's testimony should be discredited because of his obvious bias. Indeed, he acknowledged his friendship with a Union representative who lived in the same neighborhood, and testified that he was unjustly terminated and threatened to sue EES. Moreover, he lied when he claimed that upon going back to One Meadowlands in approximately late September, only one (1) employee was still there. The documentary record evidence proves otherwise in that there were ten (10) employees still working at the time.

- Garate, T. Hernandez, and Puerta Gil all seemed certain that Perilla personally took the applications from the seven (7) CRS cleaners, but Luciano completely contradicted that assertion when he testified that Perilla took them off a table, not

that the employees handed them to him. Orozco, who was also there that evening, did not testify that she saw Perilla take applications either from the group or off the table.

- In any event, putting aside the conflicting testimony, the numbers just don't add up. EES has only three (3) applications from CRS cleaners, which by itself proves that Perilla was neither given nor took applications off a table. Moreover, two (2) of the applications are dated July 22 and August 15. Assuming one of the CRS cleaners was not there on July 8, then at best Perilla could have been given five (5) applications, not seven (7), since, according to Orozco, she already gave Perilla her application on July 3.

The cumulative weight of this evidence demonstrates that that there is absolutely no support in the record for General Counsel's *prima facie* case of discriminatory hiring at 300 Lighting Way. First, the job offers to the CRS cleaners were not accepted. If that was the case, Perilla never would have called Quinn immediately after the meeting and told him that offers were rejected, which both Perilla and Quinn testified happened.[34] Further compelling a credibility determination in the Company's favor is the testimony given by three (3) General Counsel witnesses who corroborated Perilla's testimony that the offers were not accepted. Moreover, the lack of any alleged anti-union statements on July 3 demonstrate that Perilla had no reason to lie about what transpired at the July 3 meeting. The two (2) rebuttal witnesses should be discredited given the suspicious circumstances surrounding their testimonies, which were identical down exact words and the key reason they were called to testify, i.e, that the entire group said "yes" to the offer, which not corroborated by the other person at the meeting nor Garate or Brown.

De La Torre should be discredited because her testimony was both confusing and illogical. Perilla had no reason to say anything about the Union when he spoke to her on July 7,

[34] Indeed, even if the ALJ believes that the Union witnesses intended to accept the jobs that evening, it is the employer's *motive* that is at issue here. In this regard, there can be no doubt based on his testimony, and what he told Quinn, that Perilla believed the incumbent employees he met with did not want the jobs. And he acted on that belief, not animus toward the union.

and if he had made the statement as alleged by De La Torre, a job offer would not have been made. Nor should the ALJ conclude that she accepted the job offer given the conversation between Perilla and Quinn immediately following the offer. Garate's failure to corroborate De La Torre's testimony on the alleged statement and the claim that she accepted the job offer compels the conclusion that De La Torre's testimony was fabricated. As to July 9, Perilla never spoke to her that day. Why would he again offer her a job and give her an application? Indeed, he already had a Day Porter with him. Moreover, EES does not have an application from her. As such, the ALJ should discredit her testimony that Perilla spoke to her on July 9.

Finally, as to the group's applications on July 8, the ALJ should find as Perilla testified: that he was never given any applications that day. The complete contradiction in the testimony as to what was said and how Perilla supposedly got the applications shows that Perilla's version should be credited. Further, Perilla's testimony is corroborated by the documentary evidence, in that EES only has three (3) applications from the CRS cleaners. Accordingly, the ALJ should credit Perilla.

In light of the above, there is no evidence of animus at 300 Lighting Way.

B. EES Staffed the Locations Consistent With Its Long-Standing Hiring Policies.

Next, the second and third factors of the PBS *prima facie* analysis – lack of a convincing rationale for refusal to hire the predecessor's employees and inconsistent hiring practices[35] – also undoubtedly come out in the Company's favor. To that end, it was Quinn's *unrebutted* testimony that since he acquired EES twelve years ago – staffing eight to ten new jobs a year – it has been his practice *not* to hire predecessor cleaners, except on the "rare" occasion EES is instructed to do so, which, even then, typically involves hiring only a day porter. Instead, the

[35] The third factor also includes "overt acts or conduct evidencing a discriminatory motive." As set forth in full in Part A above, there are no overt acts evidencing discrimination.

Company relies on an internal referral system to make new hires. The testimony given by Perilla and Castro – who have a combined 17 years working for EES as Operations Managers – was entirely consistent with Quinn's. That is, they both testified without rebuttal that Quinn's stated procedure is applied in practice. Again, both Perilla and Castro were unrebutted on this point. Moreover, Puerta-Gil's testimony served only to corroborate the Company's witnesses. To this end, he was referred to Perilla, and the Company took referrals from him![36]

Finally, neither General Counsel nor Charging party put on any evidence even hinting that the Company's hiring policies have ever been anything other than as stated by Quinn, Perilla, and Castro. Indeed, General Counsel witness Edelstein, like Puerta-Gil, corroborates the Company witnesses' testimony on this point. In this regard, Edelstein's testimony – that the better business practice is to hire predecessor employees – was proffered to imply that EES's practice must stem from animus, an implicit acknowledgment that EES's practice is, in fact, to not hire predecessor employees and use an internal referral system.[37] Furthermore, considering

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[36] To the extent that General Counsel argues that because EES's hiring practice is not in writing it is, therefore, suspect, such an argument is without merit. See, e.g., J.O. Mory, Inc., 326 NLRB 604 (1998) (no pretext where employer acted pursuant to a well-established and consistent (but unwritten) policy of not hiring high wage earners), Oil Capital Electric, 337 NLRB 947 (2002) (consistently applied (unwritten) policies of hiring through referrals and holding applications for only 14 days not pretextual).

In cases where the Board has discredited unwritten policies, it does so where the policy is inconsistently or disparately applied and, therefore, appears pretextual. See, e.g., Massey Energy Co., 358 NLRB No. 159, supra, slip op. at 48. ("Indeed, the evidence here indicates that the unwritten trainee/red hat preference was intermittently, rather than strictly, applied at Massey subsidiaries"); Clock Electric, Inc., 323 NLRB 1226 ("The inconsistent application of the unwritten rule supports the view that this reason for the refusal to hire was pretextual."), Norman King Electric, 334 NLRB 154, 161 (2001) (unwritten policy was vague and waived for nonunion applicants, i.e., discriminatorily applied); Sioux City Foundry, 241 NLRB 481, 484 (1979) ("I am in agreement with the General Counsel that the alleged "policy" against hiring temporary employees, such as strikers from other employers, is a mere pretext conceived to avoid hiring a woman. As pointed out, this 'policy' is not written down anywhere, there are no indications that employees were aware of it, and there was no evidence that any applicant, other than Marietta Boatman, has ever been told about it.") Here, in contrast, three witnesses testified that the Company's hiring practice has been applied uniformly for the past 12 years.

[37] To the extent that General Counsel and/or Charging Party use Edelstein's testimony to discredit the truth of the Company witnesses' testimony, it would be *entirely* speculative and of no value. Indeed, to this end, Edelstein – admitted that he had never even heard of EES and was totally unfamiliar with the three (3) buildings at issue. In any event, Edelstein's testimony should be disregarded in its entirety because it is irrelevant. The fact that the other contractors may always hire predecessor employees does not mean that is the best practice for EES. And it certainly does not make EES's practice unlawful. (Tr. 205-06).

Quinn's testimony that, with one exception, *every other property EES has staffed in the past twelve years was non-union in the first place*, one cannot infer that the practice's purpose is to discriminate against unions.

In light of the above, EES's rationale for not hiring the former CRS employees is self-evident: EES simply followed the same procedure at the three properties at issue here that it follows and has followed everywhere else it has taken over an account. As such, General Counsel and Charging Party cannot argue that EES deviated in any manner from its past hiring practices. Rather, it followed them to a tee. At 120 Mountainview and One Meadowlands, EES did what it does all of the time: it did not offer employment to the incumbent employees, hiring instead from its internal referral system. Testimony on this point was unrebutted. At 300 Lighting Way, EES offered employment to the incumbents only because Quinn was instructed to do so by Adis, which, again, was entirely consistent with its long standing practice. Once Perilla understood that the incumbents did not accept the terms offered, Perilla staffed the facility with employees he had already found and had at the ready prior to his instructions to offer jobs to the incumbents.

Therefore, EES had a valid rationale for its hiring procedure in this case, which was entirely consistent with its long-standing past practice – and there is no *prima facie* animus evidence based on factors three and four.

C. EES Did Not Conduct Its Staffing In Order to Preclude Hiring a Majority of the Predecessors' Employees.

The final *prima facie* factor weighs in favor of EES as well. General Counsel and Charging Party will likely argue that because EES does not hire predecessor employees, this factor, *ipso facto* weighs against Respondent. However, unlike here, in cases where the Board has found that a Respondent "conducted its staffing in a manner precluding the predecessor's

employees from being hired as a majority," the Respondents engaged in deliberate strategies – without rationale and/or at odds with prior practice – to hire a minority of the predecessor's employees at a particular site. See Massey Energy Co., 358 NLRB slip op. at 4-5; The Parksite Group, 354 NLRB at 804; U.S. Marine Corp., 293 NLRB at 670; CNN America, Inc., 361 NLRB slip op. at 24-26, slip op. at 36 fn. 36.

Here, there is no evidence of a discriminatory scheme to keep the predecessors' employees a minority. In other words, there was no irrational strategy – at odds with past practice or applied inconsistently – that was manipulated to achieve a particular outcome at these locations. Rather, based on three witnesses' undisputed testimony, EES just did what it has done for the past 12 years at between 96 and 120 locations[38] – all but one of which had *non*-union predecessor employees. And as in GFS, infra, a discriminatory motive cannot be imputed to a practice applied consistently to non-union facilities. GFS Building Maintenance, Inc., 330 NLRB 747, 753 (2000).

In light of the foregoing, the final factor in the PBS test also comes out in favor of EES, and there is no *prima facie* case at any location. Therefore, the Company had no duty to recognize and/or bargain with the Union. For this reason, the Complaint should be dismissed in its entirety.

III. EVEN ASSUMING A *PRIMA FACIE* CASE, EES DID NOT DISCRIMINATORILY REFUSE TO HIRE THE INCUMBENT EMPLOYEES BECAUSE THEY WOULD NOT HAVE HIRED THEM REGARDLESS OF ANIMUS.

Here, as set forth in full detail above, there is no evidence of union animus at any of the three locations involved, and the case should be dismissed on that basis alone. But even assuming, *arguendo*, that there is evidence of animus, the Complaint should still be dismissed.

[38] Quinn testified that he takes over accounts at approximately eight to 10 locations a year.

As to 120 Mountainview and One Meadowlands, EES followed its consistent, long-time hiring practice of *not* hiring incumbent employees unless instructed to do so and staffing new jobs with existing and new employees hired through an internal referral system. In other words, the alleged discriminatees would not have been hired whether or not they were represented by a union. See Planned Building Services, 347 NLRB at 673-74. Finally, at 300 Lighting Way, EES followed its long standing practice by offering jobs to the incumbent employees because it was instructed to do so. But the predecessor's employees themselves failed to accept the jobs, and EES staffed the location as it would have done had it not been instructed to make the job offers.[39]

A. A Consistent Practice of Not Hiring The Employees of Predecessor Contractors Satisfies a Contractor Employer's *Wright Line* Burden in a Discriminatory Hiring Case, Even Assuming a Finding of Union Animus.

Once the General Counsel has shown that the employer failed to hire its predecessor's employees and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motive. Planned Building Services, 347 NLRB 670 (2006).

GFS Building Maintenance, Inc., 330 NLRB 747 (2000), supra, controls this case. In GFS, the ALJ, upheld by the Board, found there was no discriminatory refusal to hire where the employer – a janitorial services contractor – took over an account and hired all new employees, rather than the predecessor's employees, consistent with its traditional hiring practices. Id.

In that case, "non-union" employer GFS operated a commercial cleaning service, primarily in New Hampshire in a "union free" environment. Id. at 747. GFS provided cleaning services at a number of locations in New Hampshire for CP Management ("CP"), which

[39] It is self-evident that an employer cannot be held liable for discriminatory hiring when the alleged discriminatees not only fail to apply but point-blank inform the employer they are not interested in the job. See, e.g., Global Industrial Services, Inc., 328 NLRB 264 (1999) (No discriminatory refusal to hire where predecessor's janitorial services employees were unhappy with wage rate offered by new contractor and failed to apply for positions with new company); R&L Cartage and Sons, Inc., 292 NLRB 530 (1989) (No discriminatory refusal to hire where predecessor's employees did not apply for jobs with new employer)

managed the locations and always used GFS. Id. In 1997, the ownership of a building in Hartford, Connecticut named Hartford Square North passed to a Company that used CP. Id. CP canceled the contracts of the existing providers of services to the building, including its cleaning contracts. Id. The janitorial employees of this contractor were represented by SEIU, Local 531 ("Local 531"), which GFS President, Lisa Bourbeau ("Bourbeau") learned approximately a month before taking over the job. Id. at 747, 748.

CP directed GFS to staff Hartford Square North with Hartford area janitorial employees rather than send a crew of employees from New Hampshire. GFS placed ads in the Hartford newspaper and received a number of responses in mid-February for a March 1, 1997 start date. Id. at 749. The start date was changed to March 31, 1997, and GFS began interviews in mid-March to staff the facility. Id.

On March 31, 1997, Local 531's Secretary Treasurer, Kevin Brown ("Brown") (the same Brown who testified on behalf of the Union in this case) confronted Bourbeau at the site. He demanded that GFS hire the terminated employees, and Bourbeau declined to do so. Id. at 749-50. Bourbeau testified that GFS's long-standing practice was not to hire the employees of the predecessors except in the circumstances where the company offering the cleaning contract required that to be done. Id. at 754. Subsequently, GFS hired necessary replacements through an internal referral system, consistent with its past practice. Id. at 750, 753-54.

The Complaint against GFS alleged discriminatory hiring. The Board found substantial evidence of union animus based on the following: (1) Bourbeau's admission on March 31 that she knew the building management didn't want a Union in that building, and that if GFS were Union, GFS would lose the job like the old contractor did; (2) Bourbeau's later statements that: if she had to pay the Union rates, she would lose the job, that she would be thrown out of the

building, that the management company wanted to keep costs down, and that the union rates were beyond what she would pay; and (3) statements to employees that she was opposed to having a Union there. Id. at 752. The General Counsel also argued "that Respondent's hiring practices for the initial hiring crew in Hartford reflect its antiunion animus." Id. at 753. The ALJ acknowledged that "[a]ntiunion motivation can be inferred from the character of hiring practices of a business assuming an operation," but noted that in the cases cited by the General Counsel, the NLRB "found that there was an object by the successor to avoid hiring a majority of the predecessor employees as revealed by the successor going to great lengths to avoid considering the predecessor employees as a pool of experienced workers." Id. But where the president's credible testimony was that the company never hired predecessor employees unless directed to do so by the client, the hiring practice itself was not evidence of animus. Id.

Despite the finding of "substantial evidence of union animus" in Bourbeau's statements, the ALJ, upheld by the Board, found that, as to both the employer's initial and subsequent hiring, **it had met its burden under the second prong of Wright Line**, 251 NLRB 1083 (1980) and dismissed the discriminatory hiring allegation. The ALJ summarized his finding as follows:

> Though I find that the General Counsel has made a prima facie case under a Wright Line analysis, I find that Respondent has credibly demonstrated that it would have followed the same hiring practices in Hartford even in the event the Union was not involved. **Bourbeau credibly testified that she does not hire the employees of cleaning contractors she replaces and credibly testified that Respondent follows its internal referral system if at all possible**. This system, as noted above has been used since the inception of GFS some 30 years ago. The Company has never departed from its usage except when directed to do so, as in the hiring of the initial complement of workers in Hartford, or when internal referrals did not meet is hiring needs. **This system of hiring was clearly not implemented by the Company to avoid a union. That it has that effect currently in Hartford does not seem to me to make it unlawful**. Bourbeau testified that she would consider the predecessor employees for hiring if she could not meet her needs through the internal referral system....**Though GFS clearly harbors animus, I believe it has shown that it would have**

> **conducted its hiring in the same manner absent any union activity on the part of the predecessor employees. It has never hired predecessor employees when it took over a contract, except when directed to do so by its principal. It has never been shown to have voluntarily abandoned its internal referral system. Thus its hiring practices in Hartford are not inconsistent with its past practice which has existed in a union free environment.**

Id. at 754. (Emphasis added.)

B. EES Has Acted According to its Long-Standing Practice of Not Hiring Predecessor Contractors' Employees, Which It Has Applied In a "Non-Union" Environment Since Its Inception.

The instant matter is on all fours with GFS, and, accordingly, should be dismissed. Indeed, and as set forth in full above, EES's hiring practices are not in dispute, and, in fact, EES's case is even more compelling than GFS, where the anti-union statements were far worse in content and number than those alleged here. In this regard, **three witnesses testified without rebuttal** that Respondent's long-standing practice is *not* to hire the predecessor's employees unless instructed to do so by a client – which has occurred "rarely". In GFS, the ALJ relied on the testimony of a single employer witness on this point. EES's **three witnesses testified without rebuttal** that Respondent staffs its new accounts with existing employees and new employees hired through its internal referral system. In GFS, only the company president testified on this point, whereas, here, Perilla and Castro testified credibly and without any rebuttal that the referral system Quinn described is applied in the field as a matter of course.

Like GFS, at 120 Mountainview and One Meadowlands, EES simply **followed the same practice it consistently employed over many years** in staffing the accounts in question: it did not offer employment to or hire the incumbent employees, but instead hired employees at the three locations through its internal referral system and has continued staffing turnover using the system. The Company witnesses' testimony on this point was consistent, unrebutted, and, therefore, not in question. Thus, pursuant to GFS's precedent, even assuming a *prima facie* case

at either location, Respondent has met its burden that it would not have hired the former contractors' employees at either 120 Mountainview or One Meadlowlands, regardless of any unlawful motive.

Additionally, at 300 Lighting Way, the Company followed its long-standing practice. It offered employment to the incumbents only after being instructed to do so by the client – but once the former CRS employees turned down Perilla's job offer, he staffed the facility according to his normal practice. Therefore, even if ALJ finds evidence of animus at 300 Lighting way, the Company has met its burden regarding that location as well.

Charging Party and/or General Counsel will attempt to distinguish GFS based on the ALJ's statements in that case that: (1) GFS's "hiring practices in Hartford are not inconsistent with its past practice which has existed in a union free environment" and (2) "As I have found that Respondent's hiring actions are consistent with its past practice in a nonunion environment, I do not believe I can find them unlawful under existing law." GFS Building Maintenance, Inc., 330 NLRB at 654 and fn. 12. Relying on Pippa's testimony asserting that the cleaning industry in northern New Jersey is saturated with union representation, Charging Party/General Counsel will argue, unlike GFS in "union-free" New Hampshire, EES has been applying its hiring practice in unionized New Jersey – meaning that, unlike in GFS, EES's practice was implemented with discriminatory intent. Indeed, Charging Party/General Counsel will argue, according to "expert" Edelstein, there is no other legitimate reason for EES's practice of not hiring predecessor employees.

First, GFS does not stand for the proposition argued by the General Counsel and Charging Party. To the contrary, GFS simply holds that an Employer meets its burden under Wright Line when it does not deviate from its hiring practices. In any event, even if General

Counsel and Charging Party are correct, GFS still applies to the instant matter. Indeed, Quinn's unrebutted testimony established that EES has always operated in a "union free" environment. To this end, prior to taking over the accounts at issue here, **only once in Quinn's 12-year history** – at anywhere from 96 to 120 locations – had EES taken over where the predecessor's employees were unionized. Indeed, the one account it took over with unionized incumbents was in 2007 for BAE Systems – which Brown acknowledged was handled the same as the properties here, without consequence. Moreover, 80 percent of EES's accounts are for buildings with cleanable square footage under 100,000 square feet, which are specifically excluded from the Union's Master Contract.[40] In other words, EES began its practice and consistently applied it in a "non-union environment."[41]

In light of the above, the undisputed facts demonstrate that EES operated in a non-union environment and simply applied its normal hiring practices to union locations once in 2007 and again with the three (3) buildings at issue. Charging Party is asking the ALJ to believe that EES established its practice twelve (12) years ago and applied it consistently at least ninety-six (96) times all so that it could discriminate against unionized employees one time in 2007 and then at the three (3) buildings at issue seven (7) years later. The argument's implausibility speaks for itself. **Indeed, as counsel for Charging Party so eloquently stated during the hearing, "How**

[40] Indeed, the facts that came out at trial were in stark contrast with Charging Party's assertions in his opening statements that EES "works entirely in a market that is 70 to 90% union. Every decision Eastern makes about whether – how it deals with incumbent Employees reflects the fact that 7 or 9, 7 to 9 of 10 – out 10 – accounts that it may take [are] unionized accounts." (Tr. 19). Including the three at issue here, EES has taken over only four accounts in its history with unionized incumbent employees – and the 70 to 90 percent figure that Charging Party alluded to was based on his witness's analysis of buildings over 100,000 square feet; whereas the vast majority of EES accounts are at buildings under 100,000 square feet.

[41] Charging Party may attempt to split semantic hairs in arguing that in GFS, the ALJ was referring to a *geographically* union free environment in New Hampshire. The argument is manifestly unavailing. The ALJ was assessing the employer's motive to determine that "it would have conducted its hiring in the same manner absent any union activity" – and in doing so measured its actions against its actions when no union was involved. Here, the Company's hiring can likewise be measured against its 12 year history in which at least 99% of the properties it took over were non-union.

could you have – how could there possibly be a discriminatory motivation for a policy that is developed and applied in a non-Union environment[?]" (Tr. 347).

Contrary to Charging Party's theory, because EES's hiring practice – i.e., not hiring predecessor employees and hiring through internal referrals – was established in a "union free environment" and has been applied continuously in a "union free" environment since then, its "system of hiring was clearly not implemented by the Company to avoid a union. That it has that effect currently" does not make it unlawful. GFS, supra at 154.[42]

In light of the foregoing, even assuming, *arguendo*, that General Counsel has made a *prima facie* discriminatory hiring case, EES has met its Wright Line burden that it would not have hired the predecessor employees at 120 Mountainview, One Meadowlands, and 300 Lighting Way regardless of animus. For this reason, the Complaint that EES discriminatorily refused to hire employees at any of these locations should be dismissed, and, consequently, the Company had no duty to recognize or bargain with the Union.

[42] Likewise, General Counsel/Charging Party may try to muddy the waters with irrelevancies raised at trial. For example, General Counsel will point out that some applications are dated the same day that employees started, which is not inconsistent with Perilla's testimony that applications must be received before an employee begins working. Likewise, Castro and Perilla both testified that start dates are routinely inserted as application dates. General Counsel will also argue that certain employees may have begun working prior to turning in their applications based on the time records and the application dates. This changes nothing given the undisputed evidence that EES had workforces in place when it began at each of the locations. Indeed, both Perilla and Castro testified they had no trouble staffing the facilities and operated on a similar timeline to other properties. Simply put, there was no evidence that EES did anything different than it did elsewhere when staffing a new account. General Counsel/Charging Party may also argue that the turnover rates are high – but Castro testified that they are similar to other properties. To the extent that General Counsel/Charging Party attack Castro's and/or Perilla's testimony and credibility as to the approximate turnover rates – a term which was never defined for them – at the locations at issue, this should be completely discounted. The turnover has no bearing on the issue in this case: whether EES discriminatorily refused to hire the predecessors' employees when it initially staffed the three (3) buildings. Turnover is relevant only with a refusal to consider allegation, which is not an issue in this case. Even assuming it is, like the employer in GFS, EES followed its practice of replacing existing employees through its internal referral system.

IV. CHARGING PARTY AND GENERAL COUNSEL ARE PRECLUDED FROM ARGUING THAT EES'S HIRING PRACTICE IS INHERENTLY DESTRUCTIVE, WHICH IT IS NOT.

A. General Counsel Did Not Make An Inherently Destructive Argument in Its Complaint or at Trial, And The Issue Was Not Fully And Fairly Litigated.

The Board has held that where the General Counsel has not alleged a theory that an employer's policy is "inherently destructive" of employee rights in its complaint or litigated same at trial, it will not make an unfair labor practice finding based on such a theory. Ken Maddox Heating & Air Conditioning, Inc., 340 NLRB 43 (2003). In that case, the Board stated:

> The General Counsel never alleged that the Respondent's referral policy itself was in violation of the Act. Neither did he allege or litigate the Great Dane analysis applied by the judge in finding the policy unlawful and inherently representative of antiunion animus. The record makes clear that this was a posthearing addition to the case by the judge.
>
> **It is well established that the General Counsel's theory of the case is controlling**. See, e.g., Zurn/N.E.P.C.O., 329 NLRB 484 (1999). **It is equally well established that it is inappropriate to make unfair labor practice findings that were not fully and fairly litigated**. See, e.g., Q-1 Motor Express, 308 NLRB 1267, 1268 (1992), enfd. 25 F.3d 473 (7th Cir.1994), cert. denied 513 U.S. 1080 (1995). Therefore, we reverse the finding that the Respondent's referral policy per se violated the Act. Moreover, we do not pass on the judge's theory that the policy was inherently destructive of employee rights under the Great Dane doctrine and sufficient by itself to establish animus. These matters clearly were neither alleged nor litigated.
>
> Accordingly, the allegations of unlawful discrimination in the complaint must be supported by affirmative proof establishing by a preponderance of the evidence that the Respondent's conduct was unlawfully motivated.

Id. at 44. See, also M.J. Mechanical Services, Inc., 2005 WL 1362958 (N.L.R.B. Div. of Judges 2005), where the ALJ stated:

> Both the General Counsel and Charging Party Union argue in their posthearing briefs that the written hiring policy is inherently discriminatory and destructive of Union applicants' Section 7 rights...There is no allegation in the amended complaint that the written hiring policy was inherently destructive of Section 7 rights. It was not asserted in the opening statements by the General Counsel [ ] or the

> Charging Party Union [ ] or litigated as part of their cases-in-chief. Under these circumstances, it would be inappropriate to make an unfair labor practice finding on an issue that was not fully and fairly litigated.

(citing Ken Maddox, supra.) Likewise, it is well established that Charging Party cannot expand "enlarge upon or change the General Counsel's theory." Zurn/N.E.P.C.O., 329 NLRB 484 (1999) (refusing to consider Charging Party's "inherently destructive" theory, where General Counsel did not advance the theory at trial.)

Here, neither General Counsel nor Charging Party asserted at any time that EES's stated hiring practice – never hiring predecessor employees and hiring through a referral system – is itself unlawful. The Complaint/Amended Complaint makes no mention of EES's hiring practice. And in his opening statement at trial, General Counsel asserted that EES's desire to keep the Union out, not its stated hiring practice, was the reason for its failure to hire the alleged discriminatees. (Tr. 17). He never argued that the practice itself was unlawful. Likewise, Charging Party attacked EES's motivation for its stated practice but never argued that a neutral policy of not hiring incumbent employees is inherently destructive. Accordingly, only the existence and application of EES's hiring practice was litigated, not its effect on union-supporting applicants at the three properties at issue here or elsewhere. Thus, this issue was not fully or fairly litigated and cannot be the basis for an unfair labor practice finding.

B. EES's Hiring Practice is Not Inherently Destructive.

A neutral hiring policy that "'does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds" cannot be inherently destructive of employee rights. Zurn/N.E.P.C.O., 345 NLRB 12, 15 (2005) (citing Zurn/N.E.P.C.O., 329 NLRB 484 (1999)). In Zurn/N.E.P.C.O., 345 NLRB at 15, the employer's hiring policy gave preference to current and former employees, those known to managers, and

those referred by current employees. In holding that the policy was not "inherently destructive," the Board stated:

> Indeed, the Board has recognized, as a valid defense to an allegation of antiunion discrimination in hiring, an employer's reliance upon a neutral hiring policy much like Zurn's. Brandt Construction Co., 336 NLRB 733 (2001), enfd. sub nom. Operating Engineers Local 150 v. NLRB, 325 F.3d 818, 833-834 (7th Cir. 2003). **If an employer can rely on a priority hiring policy as a legitimate nondiscriminatory reason not to hire an applicant, it follows that such a policy cannot be inherently discriminatory**.

Id. (Emphasis added.) In this regard, the Board has routinely held that an employer's hiring process which relies on referrals from existing employees is a lawful, legitimate, and rational business practice.[43] Moreover, as set forth in detail above, in GFS, supra, at 754, the ALJ, upheld by the Board, found the employer's no-incumbent policy to be a legitimate, non-discriminatory reason for not hiring the predecessor's employees. Therefore, pursuant to Zurn/N.E.P.C.O., "such a policy cannot be inherently discriminatory." Zurn, supra at 15. Indeed, consistent with the rationale in the above-cited cases, EES's no-incumbents hiring practice cannot be inherently destructive because it is a neutral hiring procedure applied uniformly at non-union facilities that "does not on its face preclude or limit the possibilities for consideration of applicants with union preferences or backgrounds." Zurn/N.E.P.C.O., supra at 15.

Thus, any "inherently destructive" argument that General Counsel and/or Charging Party might make as to either hiring practice – not hiring incumbents and hiring through referrals –

[43] American, Inc., 342 NLRB 768 (2004) (employer lawfully sought less experienced applicants because they would be likely to accept a lower wage rate and lawfully preferred applicants who had a referral), Kanawha Stone Co., 334 NLRB 235, 236-237 (2001) (finding employer's preference for hiring "former employees, relatives of employees, or referrals by employees" lawful); Ken Maddox, supra, (policy giving preference to former employees and referrals lawful), Dilling Mechanical Contractors, 348 NLRB 98, 101-102 (2006) (preference for referrals and policy of discarding applications from nonreferred applicants after 7 days all lawful).

should be dismissed out of hand. In light of the foregoing, EES has met its Wright Line burden, and the Complaint/Amended Complaint should be dismissed in its entirety.

CONCLUSION

In light of the foregoing, Eastern Essential Services respectfully requests that the ALJ dismiss the Complaint, in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Matthew R. Porio, hereby certify that I filed Eastern Essential Service's Post-Hearing Brief to the Administrative Law Judge via electronic case filing through the Agency's website and served an electronic copy of same to the following individuals:

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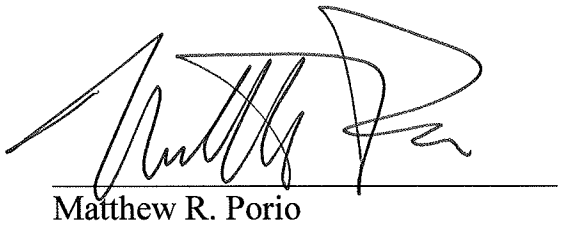

Matthew R. Porio

Dated: May 19, 2015